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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA,

v.

18-cr-00192-JL-1  
November 17, 2020  
9:10 a.m.

IMRAN ALRAI

\* \* \* \* \*

TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government: Cam T. Le, AUSA  
John S. Davis, AUSA  
Matthew Hunter, AUSA

For the Defense: Donna J. Brown, Esquire  
Michael Gregory Eaton, Esquire

Court Reporter: Molly K. Belshaw, LCR, RPR  
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Also Present: John Commisso, Esquire  
Neha Dewan, Esquire

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## 1 P R O C E E D I N G S

2 THE CLERK: The court has before it for  
3 consideration this morning an evidentiary  
4 motion hearing in criminal case 18-cr-192-JL,  
5 United States of America versus Imran Alrai.

6 THE COURT: Good morning, Counsel. Let me  
7 just get started with a couple of things.  
8 Charli mentioned to me that you wanted to have  
9 a conversation about sequestration of  
10 witnesses.

11 You want to do that?

12 MS. BROWN: I can address that, Your  
13 Honor. This is Attorney Brown.

14 So we've subpoenaed four witnesses. I  
15 don't know that we'll call all of them. We'll  
16 probably reassess after the first two  
17 witnesses. But the four witnesses are in the  
18 order we may call them. Mr. Naviloff --  
19 Greg Naviloff. Secondly is our expert,  
20 Jason Sgro. We are going to have our expert  
21 listen to the testimony of Jason -- not  
22 Jason -- of Greg Naviloff, because it may  
23 relate to his opinion testimony. And then we  
24 would either call Attorney -- and is it  
25 Commisso or Commisso?

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1 MR. DAVIS: I believe it's Commisso.

2 Or is it Commisso -- Commisso?

3 MR. COMMISSO: Commisso.

4 MR. DAVIS: Yeah, my bad.

5 MS. BROWN: I've heard many  
6 pronunciations. Commisso. Okay. I'll try to  
7 get that right. Thank you.

8 Before you joined us, Your Honor, the  
9 Government expressed that they wanted  
10 Attorney Commisso to be present during the  
11 presentation of all the evidence, as he  
12 represents the victim in this case. He is also  
13 a witness, and we are asking that he be  
14 excluded.

15 THE COURT: And the Government objects to  
16 that?

17 MS. BROWN: They do.

18 MR. DAVIS: Judge, Mr. Commisso is the  
19 victim's representative, and he has a right to  
20 be present under rule 60(a)(2). For the Court  
21 to exclude him, the Court would have to find  
22 clear and convincing evidence that listening to  
23 the testimony would somehow affect his  
24 testimony. He's an officer of the court.  
25 He's, by now, well known to the court. There's

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1 no basis for that finding, and the Defendant  
2 has not even argued it.

3 If the Court is inclined to exclude the  
4 victim, we would ask that the Defense call  
5 Mr. Commisso first and do his testimony and  
6 complete it, and then release him from his  
7 subpoena so that he can attend the rest of the  
8 proceedings.

9 But United Way has a right to have its  
10 paid attorney, who has represented them  
11 throughout, be present here. And the  
12 Defendant's motion simply rides roughshod over  
13 that right.

14 THE COURT: I don't think I agree,  
15 actually. When you just cited the rule  
16 regarding a finding the Court must make to  
17 exclude him as a victim, you mean as the  
18 victim; right? You don't mean as victim's  
19 counsel; right?

20 MR. DAVIS: They are the same, Judge. The  
21 discussion in the committee notes of Rule 60  
22 make it very clear that the rule applies both  
23 to the victim and the victim's counsel.

24 He is the counsel for the victim, and he  
25 is the way the victim asserts its right to be



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1 present in these proceedings.

2 THE COURT: Yeah, but in a situation where  
3 he's going to be a witness like today, why  
4 can't they just send an officer of the  
5 organization to allow for the sequestration?  
6 Why is it so important that he not be  
7 sequestered? He's going to testify -- I mean,  
8 he's central to this entire analysis. I  
9 mean -- that's not an aspersion, by the way,  
10 but he's very central to it.

11 And I have to admit, I can't imagine he's  
12 going to hear anything that would color his  
13 testimony. He's been literally up to his  
14 eyeballs in this litigation. He was at every  
15 hearing with a defense agreement all along.

16 I remember, hearing after hearing, the  
17 deputy clerk would contact me and say, "The  
18 Government would like Mr. Commisso to  
19 participate."

20 And I would always tell the deputy clerk,  
21 "If it's okay with the Defendant, it's okay  
22 with the Court." And he was always there. So  
23 I don't have any objection to it, but this is a  
24 little bit different.

25 Why do you want to fight on this?

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1 MR. DAVIS: Judge, I don't want to fight.  
2 I just want to defend the victim's near  
3 absolute right to be present here. And I'll  
4 add that the rule is very clear. United Way,  
5 because of the post-conviction litigation, has  
6 had to pay -- I don't know how much money to  
7 continue to be represented by counsel.  
8 Mr. Commisso is their representative throughout  
9 this litigation. United Way has a right, that  
10 is near absolute, for him to be present.

11 There is a real potential for abuse here  
12 by the defendants simply designating him as a  
13 witness and then saying, "We're going to call  
14 him last," and keeping him out of the hearing.  
15 In light of many aspects of this litigation,  
16 that potential is very real.

17 Your Honor, I don't want to fight about  
18 this, but if it is that important to the  
19 Defense that he be sequestered, and the Court  
20 is prepared to make the finding, I would ask  
21 that he be first. I don't know why the  
22 Defendant has a right to a particular witness  
23 order. And what the victim has a right to is  
24 for the Court to explore reasonable  
25 alternatives. That's right in 60(a)(2). And a

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1 reasonable alternative here is to call him  
2 first. The Defendant hasn't even stated a  
3 reason or an objection to calling him first.  
4 So, respectfully, I suggest we do that and  
5 protect the victim's right.

6 THE COURT: I do think that's a reasonable  
7 suggestion. It's very reasonable, actually.

8 MR. DAVIS: Thank you.

9 THE COURT: Why not just call him first,  
10 Attorney Brown? Then he can watch the rest of  
11 the witnesses.

12 MS. BROWN: Obviously, we've considered  
13 that, Your Honor. And as we've gone to prepare  
14 the case over the last four or five days, it  
15 just doesn't -- the foundation for things that  
16 we would ask Attorney Commisso aren't there.  
17 It does not flow in terms of what we're trying  
18 to establish for the Court.

19 I think the first two witnesses,  
20 especially Mr. Naviloff, really go to the heart  
21 of the Brady issue. And Attorney Commisso,  
22 obviously, is much more related to whether this  
23 is a third party or not a third party. And  
24 before we even get to that, we have to  
25 establish that there was a Brady violation, and

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1 we intend to do that with the first two  
2 witnesses. So we had considered that. We're  
3 not doing it for any sort of tricky reason. It  
4 was just -- it didn't flow. It didn't make  
5 sense in terms of the presentation of the case.  
6 And that's the only reason.

7 And as the Court knows, most every, if not  
8 every, document we're going to talk about,  
9 Attorney Commisso has seen, because they've  
10 been attached to documents that I'm sure the  
11 Government has shared with them. Even though a  
12 lot of the documents are under seal, they are  
13 probably consulting with him. He's aware of  
14 what's happening. This hearing is on the  
15 record. He can certainly listen to it  
16 afterwards or read it afterwards and report  
17 back to the victims as to what happened.

18 THE COURT: But that's not -- if I exclude  
19 him, I'm going to give them an opportunity to  
20 -- doesn't Mr. Meyer work for United Way now,  
21 or is he just a contractor?

22 MR. HUNTER: He is a contractor for the  
23 United Way, Your Honor.

24 THE COURT: Thank you.

25 I mean, if I did exclude Mr. Commisso from

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1 -- if I did sequester him -- I wouldn't exclude  
2 him, of course. If I did sequester him, I  
3 would give him an opportunity to have someone  
4 from the victim participate in this hearing and  
5 be present.

6 So he wouldn't have to review it later and  
7 all that. I mean, it would be available, but  
8 it wouldn't really be necessary. Let me just  
9 check the rule real quickly here. I've got to  
10 get my reading glasses. Hold on here. Okay.

11 It looks like 60(a)(2); right, Mr. Davis?

12 MR. DAVIS: Correct, Judge, yes.

13 THE COURT: Well, let me ask you -- I  
14 mean, the victim is asserting -- the  
15 prosecution is asserting the victim's right to  
16 be present, Attorney Brown, and asserting that  
17 through the attendance and participation of  
18 Mr. Commisso.

19 I mean, I don't even know, Mr. Davis, if  
20 sequestration equals exclusion. It seems to be  
21 an assumption. You're telling me the committee  
22 notes cover that? I don't know. But there's a  
23 lot of moving parts to this. There could be  
24 other representatives here. The fact that  
25 they've chosen counsel doesn't mean that they'd

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1 be excluded. So I'm just wondering about some  
2 of these things.

3 MR. DAVIS: So, Judge, if I could point  
4 the Court to the Advisory Committee notes to  
5 the 2008 revision, (a(2)).

6 THE COURT: I'm looking at it. Yep.

7 MR. DAVIS: The second paragraph of that  
8 addresses this.

9 It says, "Rule 615 of the federal rules  
10 addresses the sequestration of witnesses.  
11 Although Rule 615 requires the Court, upon the  
12 request of a party, to order the witnesses to  
13 be excluded so they cannot hear the testimony  
14 of other witnesses, it contains an exception  
15 for a person authorized by the statute to be  
16 present. And accordingly, there is no conflict  
17 between Rule 615 and this rule, which  
18 implements the provisions of the Crime Victims  
19 Rights Act."

20 THE COURT: Yes.

21 Again, though -- well, Ms. Brown, is it  
22 your position that the victim's testimony --  
23 Mr. Commisso's testimony -- would be materially  
24 altered if he heard other testimony at that  
25 proceeding?

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1           Before you answer that question --  
2           Mr. Davis, can you point to me -- I thought you  
3           made an argument earlier regarding -- it might  
4           not have been a rules-based argument --  
5           regarding the idea that counsel for the  
6           United Way is the United Way in this  
7           proceeding -- why an adequate substitute  
8           couldn't just be brought in from the  
9           United Way?

10           MR. DAVIS: So subdivision (b) of the same  
11           advisory committee notes -- it actually refers  
12           to counsel, I think, in a couple of places.

13           But if you look at subdivision (b) --

14           THE COURT: Let me just read it. Thank  
15           you.

16           MR. DAVIS: -- in the notes.

17           THE COURT: Yep.

18           MR. DAVIS: "In referring to the victim  
19           and the victim's lawful representative, the  
20           committee intends to include counsel."

21           THE COURT: Yep.

22           MR. DAVIS: Judge, we don't want to fight  
23           about this. And we'd even readily agree to a  
24           brief continuance if Ms. Brown is dead set  
25           on -- and needs then to alter her order of

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1 proof and is somehow damaged by calling  
2 Mr. Commisso first. Let's give her some more  
3 time. That's fine. But please do not  
4 sequester the attorney for the victim here.

5 THE COURT: I know, but the attorney for  
6 the victim is really involved in the facts and  
7 circumstances that gave rise to this motion to  
8 dismiss; right? His involvement is very much  
9 at issue.

10 I am undecided about this motion. My mind  
11 is very much open. And I think -- I'll  
12 admit -- I'm going to be up front about this --  
13 that Counsel's rule is not, to me, necessarily  
14 the most important factor, okay, in this  
15 analysis. It's part of it. I mean, we're at a  
16 situation where the Defendant won't budge on  
17 anything, so I guess I've got to make the  
18 determination.

19 Is it your position, Ms. Brown, that under  
20 rule 60(a)(2) -- which, I think, Mr. Davis  
21 makes a reasonable argument applies to the  
22 victim's counsel -- that his testimony would be  
23 materially altered if he heard the testimony of  
24 the proceedings?

25 MS. BROWN: Yes, Your Honor. And as a



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1 very brief offer of proof, as I said before,  
2 it's very important in terms of presentation  
3 that we start with Mr. Naviloff. Because that  
4 is the big issue here. And much of what we're  
5 going to be questioning Mr. Naviloff about is  
6 emails that he exchanged back and forth between  
7 Attorney Commisso, and that his -- it probably  
8 won't go a minute without mentioning  
9 Attorney Commisso in terms of involvement with  
10 Mr. Naviloff and the sharing of the emails  
11 between the both of them. It's not a sort of  
12 tangential reference. And all the more reason  
13 why, before we ask Attorney Commisso about some  
14 of these emails, we have to lay the foundation  
15 through Attorney -- not Attorney --  
16 Mr. Naviloff.

17 MR. COMMISSO: Your Honor, may I address  
18 one or two issues?

19 THE COURT: Sure.

20 MR. COMMISSO: Thank you, Your Honor.

21 One issue is a concern about the  
22 attorney-client privilege. Mr. Naviloff and  
23 Mr. Meyer are going to be questioned by the  
24 Defendant. And I am the only person who is in  
25 a position to ensure that that examination and

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1 the witness' answers don't infringe upon the  
2 United Way's attorney-client privilege.

3 THE COURT: How would you possibly do  
4 that?

5 MR. COMMISSO: How would I...

6 THE COURT: Have I admitted you as an  
7 intervenor or -- I guess I've admitted you pro  
8 hac vice; right?

9 MR. COMMISSO: Well, Your Honor, I filed  
10 two documents. One was for admission pro hac  
11 vice.

12 THE COURT: I'm really about asking  
13 questions and having an answer. It's just the  
14 way I operate. I'm trying to remember, because  
15 I think I remember granting you pro hac vice  
16 admission.

17 Did I do that or not?

18 MR. COMMISSO: I haven't seen it on the  
19 docket.

20 THE COURT: Mr. Davis, do you know?  
21 Because I thought I did.

22 THE CLERK: Yeah, Judge --

23 THE COURT: I did grant it, because I knew  
24 you wanted to file a motion to intervene, so I  
25 granted the motion. All right. So I guess you

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1 are admitted, so you could assert. Okay. I've  
2 answered my own question, kind of. Good.

3 Go ahead and continue.

4 MR. COMMISSO: Okay.

5 So one is the necessity for me to be  
6 present during Meyer and Naviloff's testimony  
7 to assert the privilege on behalf of the  
8 victim. Number two is the two experts are  
9 going to be present during each other's  
10 testimony. So, obviously, there's room in the  
11 rules of sequestration to allow for exceptions  
12 to that rule. And here the rule specifically,  
13 as Mr. Davis already read -- the rule  
14 specifically identifies the exception to the  
15 sequestration rule.

16 And I'd also like to say, I'm not just  
17 hired counsel in some generic sense. I am  
18 essentially, for all intents and purposes,  
19 general counsel of the United Way of  
20 Massachusetts Bay. They don't have an in-house  
21 counsel. And if I held that title of general  
22 counsel, I don't know that we'd be having this  
23 discussion; but the board of directors and the  
24 special committee authorized by the board of  
25 directors passed a resolution to engage me as

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1 the representative. The corporation can only  
2 act through representatives. And I am the  
3 corporation's representative. I know these  
4 issues better than anyone and more than anyone.  
5 And the board and the special committee -- the  
6 corporation -- has appointed me to represent  
7 them before Your Honor.

8 And with that, I will pause.

9 THE COURT: Yeah.

10 MR. DAVIS: Judge, I would only add the  
11 Court asked a direct question to Ms. Brown:  
12 Would the testimony be materially altered?

13 Ms. Brown didn't answer that question.  
14 She said that Mr. Commisso would come up in the  
15 testimony, but she -- even she does not say  
16 that an officer of the court and Mr. Commisso  
17 would be shaping, or shading, or modifying his  
18 testimony as a result of hearing any other  
19 testimony in this case.

20 Again, it's her burden. And the burden is  
21 clear and convincing evidence. She hasn't  
22 anywhere near met that burden.

23 And the Court says, "Well, the Defendant  
24 wouldn't budge." The Government isn't  
25 surprised by that, Your Honor. The Defendant

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1 has never budged at any point in this case.  
2 It's been two years of this, and so he isn't  
3 budging now.

4 Well, we say, "So what?"

5 THE COURT: Well, actually, that's not how  
6 I remember it, Mr. Davis. I admit this  
7 particular counsel has not been budging -- and  
8 she has no obligation to budge, by the way --  
9 none whatsoever.

10 But Mr. Harrington approached it  
11 differently; right? And some of the discovery  
12 decisions we made going along here laid the  
13 foundation for all this -- some of the  
14 decisions I made based on agreements between  
15 everybody. But it wasn't as if everything was  
16 fought tooth and nail. And if defense counsel  
17 wants to fight tooth and nail now, we all know  
18 she has that right and, perhaps, that  
19 obligation. So, look -- but I've got to bring  
20 this to an end because we've got to get on with  
21 this.

22 My preference -- let me just tell you, as  
23 a trier of fact of this, my preference would be  
24 that he be sequestered; okay. That's the way I  
25 like accepting testimony. I understand,

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1       though, Mr. Commisso's point that the victim  
2       and its board has entrusted him with  
3       representing them in this proceeding, and he's  
4       the only one here doing that.

5               I guess I would ask you, Mr. Commisso, can  
6       you arrange for, during your brief  
7       sequestration here, that someone else in the  
8       United Way be present?

9               MR. COMMISSO: Perhaps it's possible, but  
10       that individual couldn't really represent the  
11       United Way in the way that I will, which, as I  
12       said, there are these issues with respect to  
13       privilege that are going to come up with two of  
14       the witnesses' testimony.

15              And how do I then go back and advise the  
16       United Way, and do my duty as their attorney to  
17       provide them advice and counsel with respect to  
18       what happens at this hearing, if I have been  
19       excluded based on -- I guess it would be based  
20       on the idea that, as a member of the bar with  
21       20 years of experience practicing in the  
22       federal court, that the Court couldn't be  
23       satisfied that my testimony is not going to be  
24       materially altered, where I've read every  
25       document in the case, and I've attended the

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1 entire trial and every hearing in the case, and  
2 I know the issues as well as the attorneys who  
3 are going to be making the arguments and  
4 questioning the witnesses.

5 THE COURT: Okay. Here's the ruling. I  
6 cannot find -- I'll say it this way.

7 Despite my announced preference that  
8 Mr. Commisso be sequestered and that I will  
9 have to take this into consideration when I  
10 evaluate the testimony -- despite signaling  
11 that, I cannot find that there's clear and  
12 convincing evidence that Mr. Commisso would --  
13 based on defense counsel's argument, I cannot  
14 find, by clear and convincing evidence, that  
15 Mr. Commisso's testimony would be materially  
16 altered if he heard other testimony of the  
17 proceeding. There's just not a basis for that  
18 based on this record. So I'm going to deny the  
19 motion to sequester Attorney Commisso.

20 Now, other witnesses, Ms. Brown, you'd  
21 like sequestered, let me know.

22 MS. BROWN: I think that would just leave  
23 Attorney Meyer -- I keep saying "Attorney."

24 It would leave John Meyer to be  
25 sequestered. I don't know if the Government

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1 would intend to call Mr. Naviloff after we  
2 called Mr. Sgro, and whether he would need to  
3 be --

4 THE COURT: Experts are generally not  
5 sequestered.

6 MS. BROWN: Okay. Then that would be the  
7 only person -- would be Mr. Meyer.

8 THE COURT: So any objection, Mr. Davis,  
9 on Meyer?

10 MR. DAVIS: No.

11 THE COURT: So, Charli, Mr. Meyer will be  
12 excluded during the testimony of either  
13 witnesses, but -- well, didn't have to happen  
14 yet, though. We haven't started testimony yet.  
15 He's still there. Good.

16 Any other procedural matters,  
17 Counsel Brown, before we start?

18 MS. BROWN: Yes, Your Honor. Two just  
19 that I made a note I wanted to address.  
20 Ordinarily, if we were going to show an exhibit  
21 that was marked for ID, we wouldn't show it to  
22 the trier of fact, but it's kind of hard to do.

23 So I just wanted to -- most of our  
24 exhibits are marked for identification at this  
25 point. So to make them full exhibits, we'd



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1 actually have to show them on the screen to the  
2 witness. I just wanted the Court to see if the  
3 parties had any problem with us doing that.

4 THE COURT: Well, Counsel conferred about  
5 the exhibits.

6 I mean, is there any debate about whether  
7 there's admissibility before me in this  
8 proceeding?

9 MS. BROWN: Most of them have already been  
10 attached, if not all have been attached, to  
11 motions. So I just wanted to --

12 THE COURT: Here's the ruling: All  
13 exhibits by either party are deemed admitted in  
14 this proceeding. However, that's what I'll  
15 prejudice to both of you -- Mr. Davis, and  
16 Ms. Brown, and any counsel -- if there's an  
17 exhibit that's on the table that's been raised  
18 and you think there's some barrier to its  
19 admissibility, you should raise it. It might  
20 just be an argument that goes to weight rather  
21 than admissibility.

22 But if you think there's an admissibility  
23 argument, raise it, and I'll consider excluding  
24 it. But rather than having people lay  
25 foundations for ID and all that this hearing,

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1           that seems reasonable.

2           Any objection, Mr. Davis?

3           MR. DAVIS: No.

4           MS. LE: Your Honor, can I just point out  
5           that Ms. Brown has marked for identification  
6           exhibits that have been subject and are subject  
7           to a protective order.

8           So we'd ask that Ms. Brown make sure that  
9           those exhibits that are a part of the  
10          protective order be filed under a CO,  
11          Your Honor.

12          THE COURT: Sure.

13          Do you know which ones, Ms. Brown, are  
14          protective order-covered?

15          MS. BROWN: I would say the vast majority,  
16          if not -- except for maybe a couple of letters.  
17          So I have no problem with having them all  
18          placed under seal, just out of an abundance of  
19          caution.

20          THE COURT: The exhibits are all  
21          admissible, but I'll also submit it under seal  
22          at level one.

23          To honor the protective order, what I  
24          would ask is that after the hearing, Ms. Le,  
25          you consult with Attorney Brown. And if there

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1 are any exhibits not covered by the protective  
2 order, I'll unseal those; okay?

3 MS. LE: We will gladly do that,  
4 Your Honor. We just got dropped 1,000 pages of  
5 exhibits, so it's hard to go through every  
6 single page now. Thank you.

7 THE COURT: I understand. Thank you. And  
8 I appreciate you bringing it up. Well, let me  
9 say this, then.

10 If you've been unfairly prejudiced by this  
11 eleventh hour -- and I'm not accepting this.  
12 I'm just accepting your representation -- sort  
13 of a document dump at the eleventh hour, do you  
14 need more time to prepare?

15 MS. LE: No, Your Honor. We can move  
16 forward.

17 THE COURT: Okay. All right.

18 Anything else, procedurally, people need  
19 to bring up?

20 MS. BROWN: This isn't as much of a  
21 procedural issue, Your Honor. I just -- both  
22 Attorney Eaton and myself, and our  
23 examinations, are going to make every attempt  
24 that when we talk about a document, that we  
25 identify it as something that was either

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1 produced pretrial or it was something posttrial  
2 and, therefore, subject to the Brady issue.

3 And to the extent we get to do that and  
4 the Court has a question like, "Hey, was this  
5 pre?" Feel free to interrupt us. But we're  
6 going to try -- there's going to be some  
7 documents that were produced prior to trial  
8 that are just important to lay the foundation  
9 to the relevance and importance of the  
10 documents after trial. So we'll do our best to  
11 identify those documents for the record, but I  
12 just wanted the Court -- if it's not clear from  
13 our examination, feel free to interrupt.

14 THE COURT: Sure. Okay. That's fine.

15 I would ask -- are you talking about  
16 exhibits -- if it's a document that's been  
17 docketed, and it's 162-3, I would request you  
18 use that. And if it's -- excuse me.

19 If it's a trial exhibit, I would request  
20 you use that. Because for the court of  
21 appeals, it's going to be difficult; all right.  
22 So naming them as exhibits to this hearing --  
23 probably not particularly helpful in the long  
24 run. So do your best, please.

25 MS. BROWN: Okay.

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1           THE COURT: Okay. Now I have three quick  
2 issues I want to nail down so I have a good  
3 foundation to do this today.

4           One is time; right? I'm looking at -- let  
5 me just look quickly -- yeah. I mean, we have  
6 potentially four witnesses; right? I'm sure  
7 you both have arguments you want to advance --  
8 just plain oral argument. And I have  
9 questions. I've got several questions.

10          So I think there's a decent chance this  
11 hearing takes all day long. I don't know that,  
12 but it certainly is going to take more than up  
13 to the lunch hour. So I plan on working sort  
14 of a normal trial day. I hope people are  
15 available. But that's just my assumption right  
16 now -- that we're going to spend the day in  
17 courtroom doing this hearing.

18          Two questions for you. As I understand  
19 the motion, it's a motion to dismiss for  
20 constitutional violation to the Brady  
21 doctrine -- failure to produce exculpatory  
22 evidence that the Defendant says amounted to  
23 prejudice at trial; right?

24          There's no challenge to any discovery  
25 ruling during the case; right -- in terms of,

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1       like, a failure to either comply with Rule 16  
2       or to comply with a court order on discovery.  
3       This is a constitutional motion for failure to  
4       produce exculpatory evidence.

5               Am I right, Attorney Brown?

6               MS. BROWN: Yes, as far as I know, there  
7       wasn't a motion for discovery filed pretrial  
8       that's relevant to these issues.

9               THE COURT: No. The closest we came was  
10      that motion to exclude Mr. Naviloff, which we  
11      resolved through the production of some  
12      discovery that, as of that time, had not been  
13      provided.

14              So I'm correct that there's no challenge  
15      to a rule violation or an order violation.  
16      It's a constitutional violation under Brady;  
17      right?

18              MS. BROWN: Correct. And just to the  
19      extent that there was some back-and-forth on  
20      this prior to trial, it's relevant to the  
21      production and notice of some of these  
22      documents.

23              THE COURT: Yep.

24              Second question -- and this is for both  
25      parties. That first question for was Attorney

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1 Brown. This is for both parties.

2 One question I have about this -- this is  
3 a motion to dismiss, but there's nobody  
4 addressing in the briefing, like, what is the  
5 prescribed remedy here? There's references in  
6 both of your papers to the possibility of a new  
7 trial. And I guess my question for both of you  
8 is this: If I found a Brady violation -- let's  
9 assume I found a Brady violation that amounted  
10 to a failure to produce that was prejudicial,  
11 and I found it in violation.

12 What's the remedy? Is it possibly  
13 dismissal, possibly new trial? Is it either?  
14 Both? Like, what's the remedy? Because that's  
15 not really been focused on by the parties,  
16 except by sort of references by both sides.

17 I guess I'll hear from the prosecutor  
18 first.

19 MR. HUNTER: Thank you, Your Honor.

20 I think the remedy would not be dismissal.  
21 Because in order to show dismissal, the Court,  
22 as I understand the Defendant's argument, would  
23 have to show egregious prosecutorial  
24 misconduct. And I think if there was a  
25 technical Brady violation -- which, of course,

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1 the Government contests -- I don't think it  
2 rises to the level of truly egregious  
3 prosecutorial misconduct. And so then we're in  
4 the new trial framework. Because ultimately,  
5 this is a Rule 33 motion, with a clause that  
6 the prosecutorial misconduct is so egregious it  
7 warrants dismissal.

8 So then I think it would be -- again, if  
9 the Court finds a violation that's sufficiently  
10 problematic --

11 THE COURT: Violative of the Constitution.

12 MR. HUNTER: Right, sufficiently  
13 violative -- then we're in Rule 33. Which I  
14 think, because this is a bench trial, the Court  
15 has more flexibility than if this were a jury  
16 trial. And what the Court can do is, rather  
17 than having a whole new trial, because the  
18 Court was the finder of fact under Rule 33, the  
19 Court can basically open the trial back up  
20 again, hear additional evidence, hear  
21 additional testimony, and then, if it deems it  
22 appropriate, can amend the judgment.

23 And so we cite that rule in our papers.  
24 But I think if the Court finds a sufficient  
25 violation, the remedy would basically be for



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1 the Court to hear additional trial testimony  
2 based on this newly discovered evidence.

3 THE COURT: All right. Understood. Yeah,  
4 I appreciate you are putting a -- I saw the  
5 reference to that in your papers, and now I  
6 understand it better in the context of Rule 33,  
7 Mr. Hunter. Thank you for a clarification.  
8 Okay.

9 Ms. Brown, what's your position?

10 MS. BROWN: We do agree that the case law  
11 is such that the first analysis goes to whether  
12 a new trial can cure the Brady violation. And  
13 then after that, I agree that if the violation  
14 was egregious enough, then it's a dismissal.  
15 So we're in agreement on that.

16 The issue of hearing new evidence, I  
17 think, is very complicated at this point.  
18 Because I'll just say: It's a failure to be  
19 able to cross-examine someone. So do you do a  
20 do-over on the cross-examination? And it's  
21 sort of not this magical witness who was  
22 missing that you come in and just add to it.  
23 It's a very different type of thing.

24 So I don't think we have to deal with that  
25 right now. I do agree that's what the language

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1 of Rule 33 says. And I think that would be for  
2 the Court to deem whether that's a remedy.  
3 Obviously, if we don't think a new trial is an  
4 adequate remedy, we don't think that is an  
5 adequate remedy as well.

6 THE COURT: Right. It focuses on the next  
7 level of egregiousness as to whether that  
8 process would cure. Okay. I will say this.

9 While I have a very, very open mind about  
10 whether this is a Brady violation -- there's a  
11 lot of interesting questions here, and not a  
12 lot of precedent in the cases for this type of  
13 situation -- I will say this.

14 The Defendant's papers make some very,  
15 very serious allegations and accusations  
16 against the prosecution. What I've read,  
17 though, in terms of the briefing, the  
18 documents, my memory of the trial -- this  
19 doesn't really rise to what I would view as,  
20 you know, egregious prosecutorial misconduct,  
21 if it's misconduct at all. It strikes me more  
22 as, if it's a violation -- if it is, it was  
23 more sort of a unique situation that presented  
24 itself with an expert witness that had done  
25 some work for the victim before, and very

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1 pervasive involvement by the victim's counsel.  
2 It doesn't strike me as an intentional effort  
3 to manipulate the discovery process, or even,  
4 like, some sort of really gross negligence that  
5 might even rise to that level.

6 I have an open mind about it. And I'm  
7 going to listen, of course, to the evidence;  
8 but at this point, the egregiousness of it is  
9 not coming through to me in terms of  
10 intentional misconduct and intentional  
11 discovery abuses, or even -- so they might have  
12 been impactful, but not impactful in such a  
13 significant way that even a negligent violation  
14 would have to be labeled "egregious." That's  
15 my sense early in the thing. I just want you  
16 to know that's where my head is now. Of  
17 course, I'm open to being persuaded by both  
18 sides. Okay.

19 While I do have questions, I think we  
20 should get underway with the witnesses. I  
21 think that's the best approach. So the burden  
22 of proof here is on the Defendant.

23 I'll let you call your first witness,  
24 Ms. Brown.

25 Let's sequester Mr. Meyer, please, Charli.

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1 THE CLERK: Very good.

2 Mr. Meyer, I'm going to place you in the  
3 waiting room.

4 MS. BROWN: And the Defense is going to  
5 call Mr. Greg Naviloff.

6 So if the Court could swear him in.

7 THE CLERK: Mr. Naviloff, please raise  
8 your right hand.

9 Do you solemnly swear the testimony you're  
10 about to give will be the truth, the whole  
11 truth, and nothing but the truth, so help you  
12 God?

13 MR. NAVILOFF: I do.

14 THE CLERK: And for the record, please  
15 state your full name and spell your last name.

16 MR. NAVILOFF: Greg Naviloff,  
17 N-A-V-I-L-O-F-F.

18 THE CLERK: Thank you.

19 MS. BROWN: Thank you.

20

21 DIRECT EXAMINATION

22 BY MS. BROWN:

23 Q. And, Mr. Naviloff, do you still work for RSM?

24 A. Yes, I do.

25 Q. And what role do you currently hold at RSM?

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1 A. I am a director within the financial  
2 investigation dispute services practice.

3 Q. And this was -- you were questioned about this  
4 briefly at trial.

5 You are not an IT expert; correct?

6 A. I don't carry any credentials in IT services.

7 Q. And just for credentials, your credentials are  
8 in accounting, and specifically forensic  
9 accounting; correct?

10 A. And business valuation and valuation as a  
11 whole.

12 Q. Now I am going to ask you about a couple --  
13 well, strike that.

14 You've had, for lack of a better word, two  
15 hats in this case; right? You worked for  
16 United Way; correct?

17 A. Yes, I worked for United Way. If the hats are  
18 engagement letters, yes. There's two  
19 engagement letters -- two contracts or  
20 agreements.

21 Q. So somewhere in the middle of July of '18 up  
22 until the spring of 2019, you were working for  
23 United Way with an engagement letter that was  
24 signed between you and Mr. Commisso; correct?

25 A. That is correct, yes.

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1 Q. And then after that -- and to the summer of  
2 2019 until today, you have engagement letters  
3 with the Government -- the U.S. Government;  
4 correct?

5 A. Yes, I have a contract with the U.S. Attorney's  
6 Office to assist.

7 Q. So I want to go back and ask you some questions  
8 about your representation -- not  
9 representation -- your work for the United Way  
10 back in summer of 2018.

11 And I'm going to ask the clerk to bring up  
12 Exhibit Z, which is now a full exhibit. And  
13 just for the record, that is the report that  
14 you did for the United Way.

15 (Pre-marked Defendant's Exhibit Z  
16 introduced.)

17 MS. LE: Ms. Brown, do you have the ECF  
18 number for that exhibit?

19 MS. BROWN: That one doesn't have an ECF  
20 number because I don't think we attached that  
21 before. I have the ECF numbers for other  
22 exhibits, but that one, I do not have. And I'm  
23 looking specifically at page 30 of Exhibit Z.

24 THE COURT: Is that Deputy Clerk Uhrin  
25 who's running this?

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1 THE CLERK: Yes.

2 MS. BROWN: That's exactly what I'm  
3 looking for. Thank you.

4 Q. (By Ms. Brown) So, Mr. Naviloff, do you  
5 recognize this document? And we're looking --  
6 I'm going by the PDF counter number in terms of  
7 number, but this is page 30.

8 Do you recognize this document?

9 A. Not specifically to a meeting, but, generally,  
10 yes.

11 Q. If I told you this was the -- I think in some  
12 of your emails you used the word "slides," but  
13 a presentation that you helped put together for  
14 a committee at the United Way regarding  
15 allegations of loss and theft regarding  
16 Mr. Alrai, does that refresh your recollection?

17 A. Well, we had a number of committee -- special  
18 committee meetings, and board meetings, and  
19 different groups within United Way that  
20 received varying amounts of information. So,  
21 this appears to be a slide from one of those  
22 meetings and/presentations.

23 Q. Okay.

24 And we'll get to it later, but there were  
25 several emails back and forth regarding putting

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1           together some of these presentations for the  
2           United Way; correct?

3       A.    Emails back and forth between who?

4       Q.    Between you and your team at RSM.

5       A.    Yeah. Presumably, we exchanged emails, yes.

6       Q.    And just for the Court's notation, this  
7           document, Exhibit Z, was produced prior to  
8           trial. So this is a document I'm just setting  
9           a foundation for.

10                So in this document, the bar at the top  
11           says "Potential Recoveries"; correct?

12       A.    Correct. Yes.

13       Q.    And the purpose of this slide was to look at  
14           sources of funds to -- for United Way to  
15           recover regarding the losses involving  
16           Mr. Alrai; correct?

17       A.    That's correct.

18       Q.    And in the middle, there's a graph or a bar  
19           graph that identifies \$1,025,000 of coverage  
20           that is available from the Chubb insurance  
21           policy that United Way had; correct?

22       A.    A column labeled "Coverage," yes, that contains  
23           two amounts that total that, yes.

24       Q.    Now, under that chart, there's another bullet.  
25           Actually, I think the second bullet.



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1           It says, "There is potential for  
2 additional recoveries as a result of the  
3 potential criminal action brought against Alrai  
4 by the U.S. Attorney's Office"; correct?

5 A. Correct.

6 Q. And the third bullet is "Counsel will prepare a  
7 proof of claim for insurance purposes and  
8 continue to support the U.S. Attorney's Office  
9 investigation and prosecution of Alrai";  
10 correct?

11 A. Correct. Yes.

12 Q. So when you're meeting with the people in  
13 control at United Way, one of the sources of  
14 funds that you're looking at for loss is the  
15 criminal prosecution; correct?

16 A. One of the avenues that I was made aware of by  
17 counsel was this process, yes.

18 Q. And by "counsel," do you mean Attorney Commisso  
19 or the attorneys from the U.S. Attorney's  
20 Office?

21 A. Attorney Commisso, yes. This is a report --

22 Q. So he told --

23 A. Sorry. If I can continue.

24 Q. It's hard not to interrupt.

25 A. No, that's okay.

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1           This is a report that, presumably, was  
2           prepared -- I believe most of these were  
3           prepared with Mr. Commisso, and Mr. Commisso  
4           either providing input or incorporating some of  
5           this informations himself into these slides.

6       Q.    So when you were helping to put the slide  
7           together, there were conversations about the  
8           fact that a criminal prosecution might be a  
9           source of recovery for the United Way; correct?

10     A.    I don't recall any conversations. I think this  
11           may be an area that Mr. Commisso put this in  
12           here. I know generally, we were aware that the  
13           U.S. Attorney's Office was investigating, but I  
14           don't recall any real discussion in substance  
15           around this.

16     Q.    But you were generally aware that a criminal  
17           case may be a source of funds for the  
18           United Way?

19     A.    Advising the special committee and advising  
20           United Way, our mutual client, this was  
21           certainly a potential.

22                   (Audio drops for 37 seconds.)

23     Q.    (By Ms. Brown) Here is a group of attorneys  
24           and the United Way.

25                   Does that look familiar to you?

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1 A. Yes, it does.

2 MS. BROWN: And I'm going to ask you,  
3 Tracy, to go to page six of this document.

4 Q. (By Ms. Brown) And it shows your signature on  
5 page six; correct?

6 A. Correct.

7 Q. I'm going to go back to page one of this  
8 exhibit. And I believe it is that -- if we can  
9 pull out the first paragraph after "Objective."

10 And as part of this agreement, you and RSM  
11 agreed to provide "various accounting,  
12 financial, economic, forensic, investigative,  
13 or other services, including the preparation of  
14 a Rule 26 expert report"; do you see that?

15 A. Yep, I do.

16 Q. What's your understanding of a "Rule 26 expert  
17 report"?

18 A. Rule 26 -- don't quote me on it, but I believe  
19 it's a factual expert report.

20 Q. So when you entered into this engagement letter  
21 with Attorney Commisso and United Way, you  
22 understood that that would include a Rule 26  
23 expert report?

24 A. We have standard language in our contracts,  
25 engagement letters. This is boilerplate

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1 language -- what we include in our contracts as  
2 far as always a potential that some expert  
3 testimony may be necessary.

4 MS. BROWN: If you could take that down,  
5 Tracy. Thank you. Actually, just take down  
6 that pullout or the magnification. Go to page  
7 three of the same document.

8 Q. (By Ms. Brown) Looking at the fourth paragraph  
9 of that document, it says that "the conclusion  
10 of the engagement" -- yeah, right there.

11 So this paragraph here talks about "at the  
12 conclusion of the engagement," that "you will  
13 protect any confidentiality involving your work  
14 for the United Way"; does that sound like  
15 boilerplate language as well?

16 A. Yes.

17 Q. And that was in that engagement letter as you  
18 protecting work that you did for the  
19 United Way; correct?

20 A. Correct.

21 MS. BROWN: You can take that down, Tracy.

22 Q. (By Ms. Brown) Now, when you were working for  
23 the United Way, you sent billings to  
24 United Way; correct?

25 A. Correct, yes.

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1 (Pre-marked Defendant's Exhibit M  
2 introduced.)

3 Q. (By Ms. Brown) And I'm going to pull up  
4 Exhibit M, which is the August 3, 2018 billing  
5 that RSM sent to Attorney Commisso.

6 Does that look familiar to you?

7 A. Yes, it does.

8 Q. And that's a bill for -- I'm reading my notes  
9 and not that -- but for \$45,171.70; correct?

10 A. Correct. Yes.

11 MS. BROWN: And, Tracy, I'll have you pull  
12 up Exhibit N.

13 (Pre-marked Defendant's Exhibit N  
14 introduced.)

15 Q. (By Ms. Brown) Which is a September 10, 2018  
16 invoice RSM sent to Commisso for \$170,682.18;  
17 correct?

18 A. Correct.

19 MS. BROWN: And pull up Exhibit O, which  
20 is the October 11, 2018 invoice that RSM sent  
21 to Attorney Commisso for -- actually, that  
22 one's -- yeah.

23 (Pre-marked Defendant's Exhibit O  
24 introduced.)

25 MS. BROWN: So the one that has 113 is O,

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1 so the next one will be 30,000, which is --  
2 bring up Exhibit P. Oh, I'm sorry. I've got  
3 that at 55,000.

4 (Pre-marked Defendant's Exhibit P  
5 introduced.)

6 MS. BROWN: And then I'm looking for  
7 Exhibit Q, which is a January 8, 2019 invoice.

8 (Pre-marked Defendant's Exhibit Q  
9 introduced.)

10 MS. BROWN: Now if you can -- I don't know  
11 if it's possible, Tracy, to pull out the third  
12 line that starts with the words "ad hoc  
13 response." Yes, that's good.

14 Q. (By Ms. Brown) So this billing talks about ad  
15 hoc responses to U.S. Attorney's Office  
16 regarding criminal investigation proceedings;  
17 correct?

18 A. Correct. Yes.

19 Q. So when you were working for the United Way,  
20 you were billing the United Way for work that  
21 you were doing with -- in conjunction with the  
22 U.S. Attorney's Office in terms of meeting with  
23 them and producing documents; correct?

24 A. This would be as described -- "some responses  
25 to requests from the U.S. Attorney's Office."

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1 I don't think those requests were made directly  
2 to RSM, but I could be wrong. I don't have my  
3 recollection of January 2019. But, most  
4 likely, they would direct it to Mr. Commisso --  
5 Attorney Commisso. And we were assisting him.

6 Q. Now, we talked a little while ago about the  
7 fact that you had -- in your engagement letter,  
8 it talks about confidentiality regarding your  
9 work from the United Way.

10 When you started having conversations with  
11 the U.S. Attorney's Office or emailing the U.S.  
12 Attorney's Office or phone calls, did you  
13 assert that privilege to those contacts?

14 A. Any discussions we would have had with the U.S.  
15 Attorney's Office would have been with  
16 Attorney Commisso, who ultimately can choose to  
17 waive or determine whether there is privilege  
18 or what can be shared.

19 So we follow the lead of -- or I follow  
20 the lead of Attorney Commisso with respect to  
21 what can and can't be shared with the U.S.  
22 Attorney's Office.

23 Q. You don't have any recollection of  
24 Attorney Commisso asserting attorney-client  
25 privilege as to any of your contacts or

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1 document productions with the U.S. Attorney's  
2 Office, do you?

3 A. I believe there was discussion -- ongoing  
4 discussion with -- just about anything that was  
5 requested, it was shared with Attorney Commisso  
6 for that very reason; right? So that he could  
7 be the one responsible for determining what to  
8 share.

9 There may have been isolated incidences  
10 where there was maybe a phone discussion or  
11 some sort of discussion with respect to  
12 information that made its way to the U.S.  
13 Attorney's Office directly from us, with a cc  
14 to Attorney Commisso.

15 MS. BROWN: Thank you, Tracy. You can  
16 take down that document.

17 Q. (By Ms. Brown) So we talked about the fact  
18 that you worked -- you and RSM worked for  
19 United Way through the summer and into the fall  
20 of 2018; does that sound correct?

21 A. That's correct, yes.

22 Q. And part of that work you did was to prepare a  
23 report we reviewed a few minutes ago; correct?

24 A. There were multiple presentations that were  
25 provided to the special committee and others,



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1 updating them periodically and including  
2 reports that included a loss quantification.

3 (Pre-marked Defendant's Exhibit S  
4 introduced.)

5 MS. BROWN: I'm going to ask you some  
6 questions about Exhibit S, which is also  
7 Document No. 164-19.

8 Tracy, if I could pull up the bottom half  
9 of that email that starts "From: Naviloff,  
10 Greg." And that whole -- basically, the whole  
11 half. Yeah, if you could pull that out.

12 Q. (By Ms. Brown) Now -- and this is November 9,  
13 2018; correct?

14 A. Yes.

15 Q. And you're still working for United Way and  
16 Attorney Commisso at that point?

17 A. Yes, that's correct.

18 Q. Now, you send an email to one of your  
19 colleagues at RSM, Chris Fitzgerald; correct?

20 A. Correct. Yes.

21 Q. And in that email, you state, "I had a good  
22 meeting with the U.S. Attorney's Office.  
23 Sounds like the case will fall upon RSM's  
24 testimony if they are to bring charges";  
25 correct?

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1 A. Correct.

2 Q. And so you were telling the rest of your team  
3 that you met with the U.S. Attorney's Office;  
4 right?

5 A. Correct. Yes.

6 MS. BROWN: And you can take the pullout  
7 down, Tracy, in terms of the magnification.

8 Q. (By Ms. Brown) And the reply from  
9 Chris Fitzgerald says "great news"; right?

10 A. Correct.

11 Q. And the "great news" is that you're going to  
12 make more money off this case; right?

13 A. No.

14 Q. No, that's not the great news?

15 A. No.

16 Q. So the great news is that -- what is the great  
17 news? Tell me what the great news is.

18 A. Well, I said I had a good meeting with the U.S.  
19 attorney, right?

20 Chris responded "great news." So he  
21 thinks the fact that I had a good, productive  
22 meeting with the U.S. Attorney's Office is good  
23 news; right? Because there's a lot that goes  
24 into calculations. There's a lot that goes  
25 into fact-finding. We were currently, at that

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1 point in time, assisting Mr. Commisso/Commisso  
2 Law with sharing information with the U.S.  
3 attorney with respect to the work we had done.  
4 So the fact that we had a good meeting was good  
5 news to my team.

6 Q. But you did go on to be retained by the  
7 Government in this case; correct?

8 A. Yeah, later down the road.

9 Q. In the following summer -- summer of 2019;  
10 right?

11 A. Correct.

12 Q. And you made some money off of that; correct?

13 A. Well, I'm an employee of RSM, so...

14 Q. Well, your company makes money?

15 A. I'm not compensated off of any particular  
16 engagement.

17 MS. BROWN: Now I'm going to bring up  
18 Exhibit T.

19 (Pre-marked Defendant's Exhibit T  
20 introduced.)

21 Q. (By Ms. Brown) And this is another email.

22 And in this email you say, "Call with U.S.  
23 attorney went well based on info you provided."

24 A. I'm getting close to the screen because I'm  
25 trying to find it.

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1 Q. Yeah, me too. I'm very nearsighted as well.

2 So, I think, Tracy, if you see after the  
3 caption it says, "Thank you. FYI." If you can  
4 pull that out. Yeah, right there.

5 So it says, "Call with U.S. attorney went  
6 well based on info you provided"; correct?

7 A. Correct. Yes.

8 Q. And that is directed at Chris Fitzgerald,  
9 Ryan Gilpin, Sean Renshaw?

10 A. The entire team, for the most part.

11 Q. Entire team. Great.

12 You can take the pullout down, Tracy.  
13 Thank you.

14 So this -- again, in the month of  
15 November, you're talking to the U.S. attorney  
16 about the criminal case; correct?

17 A. Correct. Yes.

18 Q. And we already know from back -- in the report  
19 in October that you did for RSM -- the internal  
20 report -- one of your goals of the criminal  
21 case was to recover money for United Way;  
22 correct?

23 A. That was a United Way goal -- to recoup its  
24 losses.

25 MS. BROWN: Now if I could bring up

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1 Exhibit F.

2 (Pre-marked Defendant's Exhibit F  
3 introduced.)

4 Q. (By Ms. Brown) So this is a very brief email.  
5 It's an email regarding the fact that --

6 It says, "I have attached the indictment."  
7 And that's from Attorney Commisso; correct?

8 A. Correct.

9 Q. And so he was sending that information to you  
10 on November 29, 2018; correct?

11 A. Correct. Yes.

12 Q. And you're still employed -- well, you and RSM  
13 are still working for United Way at that  
14 point -- not the Government; correct?

15 A. That's correct, yes.

16 Q. Now, you were hired by the Government -- if I  
17 told you July 19, does that sound correct that  
18 that's the specific date of your letter with  
19 the Government?

20 A. That does sound about right. Yes.

21 Q. And I'm referring to document 170-2:6.

22 You were hired by the Government to,  
23 quote, "Update and refine the United Way loss  
24 analysis reforms for United Way for purposes of  
25 your trial testimony"; do you remember

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1           testifying to that?

2       A.    Yes, that's correct.

3       Q.    And so, basically, you were hired to take work  
4           that you had, quote, "already done" and add to  
5           it?

6       A.    To evaluate the Government's evidence, right,  
7           in conjunction with prior evidence. And where  
8           it was consistent, obviously, then that was  
9           good. And where there were contradictions,  
10          then it would be taken to an accountant. So  
11          it's just evaluating new evidence.

12      Q.    And so they gave you additional evidence, and  
13           you used some of your findings that you had  
14           already made in your work for United Way and  
15           put that all together; correct?

16      A.    Correct. Yeah, so I looked at what they had,  
17           and took what already existed, and pulled  
18           together what was the most reasonable approach  
19           to calculating losses, as well as personal  
20           enrichment by Mr. Alrai, which is a completely  
21           secondary calculation.

22      Q.    Now, you used the word "I," and you used that  
23           at trial, too.

24                   And at trial, I don't know if you recall,  
25           you said, "When I use the word 'I,' I really

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1 mean 'we.'"; remember that?

2 A. Yes, "I" is "we" in just about all my reports.  
3 I work for a consulting firm.

4 Q. So I want to talk about that a little bit.

5 So even though "I" means "we," when you do  
6 billing on a case, you break it down for each  
7 person; right?

8 A. Correct. Yes, most billings.

9 Q. And I'm going to show an example of that right  
10 now, which is Exhibit M, which is information  
11 regarding the billing records. And if we go to  
12 the next page of Exhibit M.

13 So here we can see that there's multiple  
14 people working on this case; correct -- and by  
15 "this case," I mean working for the Government?

16 A. Yes. Multiple phases and work streams, yes.

17 Q. And in terms of -- well, actually, this is an  
18 August bill, but this is your opinions that you  
19 had given to United Way. In this bill,  
20 United Way -- RSM has billed United Way  
21 159 hours. And 23 of those hours were billed  
22 by you.

23 Can you see that?

24 A. Yes.

25 Q. And if we could go to Exhibit N, and, again,

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1 the second page. This is September 2018.

2 United Way's billed 397.9 hours, and 21 of  
3 those hours were billed by you; correct?

4 A. For all the work streams, yes.

5 Q. And during this period of time through the  
6 summer and the fall of 2018, one of the major  
7 tasks that you had, or you and RSM, was to look  
8 at a loss analysis, finding evidence of loss;  
9 correct?

10 A. So both potential losses and internal control  
11 evaluation is the phase two -- work stream two  
12 of three.

13 Q. But part of it was looking at evidence of loss?

14 A. Yes.

15 Q. Or "loss potential" is the word you used;  
16 correct?

17 A. Potential losses.

18 Q. Yeah.

19 And "potential losses" means potential  
20 recovery; right?

21 A. Potential losses means that I don't have an  
22 opinion as to whether a loss happened until we  
23 complete our work; right? So part of it is  
24 evaluating whether there was a loss or not.

25 Q. So let's go to exhibit -- we're still on



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1 Exhibit N. It says that Ryan Gilpin billed  
2 48 hours.

3 Yeah, that's some -- slightly under  
4 "Technology Specialist" -- it's a little right  
5 under that, Tracy, if you could pull that out.  
6 It starts with "Diego Rosenfeld." That's  
7 great.

8 So under "Technology Specialist,"  
9 Ryan Gilpin has billed 48 hours for that month;  
10 correct?

11 A. Correct, yes.

12 Q. And Diego Rosenfeld has billed one hour;  
13 correct?

14 A. Correct. Yes.

15 Q. Who is the more senior of those two people?

16 A. Diego is partner, as is shown here, and Ryan is  
17 an associate. So partner is more senior than  
18 associate.

19 Q. And so at this period of time, when one of the  
20 things you're working on is identifying  
21 potential loss, Ryan Gilpin is doing the bulk  
22 of the work, at least for the technology  
23 specialist; correct?

24 A. That's correct. Yes.

25 Q. Let's go to Exhibit O. So this is Exhibit O.

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1 And this is the October 2018 billing. If I  
2 could go to the second page.

3 And if I told you that RSM billed  
4 283.8 hours that month, and 26.5 of those hours  
5 were billed by you, does that sound correct by  
6 looking at this document?

7 A. Correct, for all the work streams, including  
8 those that I was leading.

9 Q. And if we could then go to -- that was O -- P,  
10 and second page again.

11 And it shows that RSM billed United Way  
12 137 hours, and 33.2 hours of those were billed  
13 by you; correct?

14 A. Yes, that's correct.

15 Q. And in this case, Ryan Gilpin billed 4.5 hours;  
16 correct?

17 A. Yes, that's correct.

18 Q. So when we see billing from Ryan Gilpin, he's  
19 under a different subheading than you; right?

20 A. Yes. He's listed as "Technology Specialist."

21 Q. And you're listed under the forensic -- it says  
22 "Forensic Team"?

23 A. Yes, that's correct.

24 Q. And by "forensic," that means forensic  
25 accounting; correct?

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1 A. "Forensic" incorporates a larger profession  
2 than just forensic accounting. For purposes of  
3 this? Yeah, I guess it, quite technically,  
4 could be a -- renamed "forensic accounting," as  
5 that's the primary background for most of my  
6 team in this list.

7 Q. And then I'm going to pull up Exhibit Q, which  
8 is the January 2019 billing, and go to page  
9 two. This is the one we talked about -- the ad  
10 hoc work for the U.S. Attorney's Office.

11 And in this billing, you billed 26 --  
12 United Way billed 26 hours, and ten of those  
13 are billed by you; correct?

14 A. It looks like there's five on top and ten  
15 below. So maybe a 15.5 -- 5.5 plus ten.

16 Q. Would this have been the bill that would have  
17 included you testifying at the trial?

18 A. This is November 30. This is pre-engagement.  
19 I wouldn't have testified at this point.

20 MS. BROWN: And so I'm going to kind of  
21 switch gears now to talk about the work that  
22 you did for the U.S. attorneys with Exhibit V.

23 (Pre-marked Defendant's Exhibit V  
24 introduced.)

25 Q. (By Ms. Brown) And this is October 2019.

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1           So this would be when you were working for  
2           the U.S. Attorney's Office; correct?

3       A.    Yes.    Addressed to Attorney Davis.

4       Q.    And if we go to the second page of this, and it  
5           shows that there were -- I could see it --  
6           203 hours billed in working for the U.S.  
7           government, and 38.5 of them were billed by  
8           you; correct?

9       A.    That's correct, yes.

10      Q.    Now, this bill looks a little different because  
11           you don't have the subheadings with "Technology  
12           Experts" versus "Forensic" that we looked at on  
13           the other billing.

14           Am I reading that -- that it is different  
15           from the other bill?

16      A.    Yeah, it's lacking subheaders.

17           MS. BROWN:   And so let's look at  
18           Exhibit W, and a second page of that.

19           (Pre-marked Defendant's Exhibit W  
20           introduced.)

21      Q.    (By Ms. Brown)   And that shows 181.2 hours that  
22           RSM billed, and 51 of those hours were your  
23           hourly billings; correct?

24      A.    Other -- so I get 50 -- yeah, 51.   Correct.

25      Q.    And I mistakenly referred to this earlier, but

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1 this would have been the billing incorporating  
2 your testimony; correct?

3 A. That's correct, yes.

4 Q. So you, personally, would have had a higher  
5 billing for this period because you were  
6 getting ready to testify, and testifying;  
7 correct?

8 A. Yes. My recollection is we had already gone  
9 over -- we said a set, agreed-upon amount for  
10 this work. So we had certainly utilized the  
11 full amount that we could in terms of hours  
12 we're going to bill.

13 So I guess the best way to look at it is a  
14 cap on what we agreed to bill the U.S.  
15 Attorney's Office. And for this matter, the  
16 volume of work and the amount of work we did  
17 exceeded what could be recovered. So I think  
18 you see here less time and excess of budget.

19 So -- but, yeah, this looks like -- I'm  
20 just reorienting myself with this. So it looks  
21 like it's the complete invoice with a credit  
22 for excess over our cap.

23 Q. And when you were working for the Government,  
24 you still had that duty of confidentiality to  
25 RSM?

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1 A. Sorry, I don't understand the question.

2 Q. So you had signed an engagement letter with RSM  
3 saying that you had a duty of confidentiality  
4 to them; correct?

5 A. United Way?

6 Q. United Way, I'm sorry.

7 A. Yeah.

8 Q. You had a duty of confidentiality to United Way  
9 for the work you did for United Way?

10 A. That agreement was still in force, yes.

11 Q. But you're taking some of that work that you  
12 did for United Way and incorporating it into  
13 the work that you're doing for the U.S.  
14 Attorney's Office; right?

15 A. As permitted by Attorney Commisso and  
16 United Way, yes -- or were permitted.

17 Q. So in terms of what you were sharing with the  
18 U.S. Attorney's Office, you were still under  
19 the control of Attorney Commisso, because he  
20 still controlled the confidentiality of your  
21 previous work; is that how I understand this?

22 A. Well, we had many work streams that we were  
23 assisting with. So he operated as a conduit to  
24 make sure that what we were turning over was  
25 areas that he had agreed to waive privilege.

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1           So, yes, we assisted with the transfer of  
2           information.

3       Q.   And that role of Attorney Commisso of assisting  
4           in the transfer of information -- that  
5           continued after you went to work with the U.S.  
6           Attorney's Office; correct?

7       A.   Where there was information related to the work  
8           that we had done while engaged by United Way,  
9           yes.

10      Q.   So as a hypothetical, if you are trying to put  
11           together a report for the U.S. Attorney's  
12           Office and you're like, "Hey, there's this  
13           document that I remember when I worked for  
14           United Way that is real important to this  
15           analysis," did you call him up and say, "Hey, I  
16           need to go back and use this report so I can  
17           incorporate it and give a valid opinion to the  
18           U.S. Attorney's Office"?

19                   Is that how that work stream is going?

20      A.   Well, it sounds like you're coming up with a  
21           hypothetical. What I can say is actually what  
22           happened, rather than hypothetically.

23                   We received a number of requests from  
24           either the U.S. Attorney's Office to us, with a  
25           cc to Attorney Commisso; or to Attorney

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1           Commisso and then passed along to us where  
2           certain information was being sought. And when  
3           those requests came in, we made every effort to  
4           share everything and anything that was  
5           responsive to those requests in consultation.

6       Q.    You said you "made every effort to share  
7           everything" that was covered by their requests?

8       A.    Yes. So I would ask the team to look through  
9           the -- our system of record, which is our  
10          server folders, and share all responsive  
11          materials that were relevant and available.

12      Q.    So if the U.S. Attorney's asked for it, you'd  
13          go find it and give it to them?

14      A.    We would hand it to Attorney Commisso and/or  
15          send it directly to the U.S. Attorney's Office  
16          with a cc to Attorney Commisso.

17      Q.    So it sounds like there's at least two streams.  
18          Sometimes there's a direct stream when you  
19          decide it's important and give it directly to  
20          the U.S. Attorney's Office; and then sometimes,  
21          you're filtering it through Attorney Commisso  
22          as a stream to get it to the U.S. Attorney's  
23          Office; is that correct?

24      A.    Well, yes, it would -- and we're working in the  
25          mode of not staring at any documents. I'm



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1 happy to stare at any documents you have.

2 But the general praxis was, if there was a  
3 volume of information that we thought couldn't  
4 easily be discussed with Attorney Commisso, we  
5 would send it to Attorney Commisso for his  
6 review. If it was easy enough to discuss over  
7 the phone or through maybe even a Webex, talk  
8 through the documents, and then share them  
9 directly with a cc to Attorney Commisso.

10 Q. But what I'm not understanding is if you have  
11 this duty of confidentiality to the United Way,  
12 wouldn't, in theory, you have to go through  
13 Attorney Commisso for everything that you give  
14 to the Government?

15 A. And that's what we did, yes. In one way,  
16 shape, or form, Attorney Commisso was apprised  
17 and aware of the documents that we were sharing  
18 with the U.S. Attorney's Office.

19 Q. So Attorney Commisso was deciding what the  
20 Government was going to get for evidence in  
21 this case?

22 A. Was he reviewing his -- the documents for those  
23 that remained under privilege?

24 Q. No, I'm just saying that, as I understand what  
25 you're saying, the Government would make a

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1 request to you saying, "We need something  
2 related to" -- whatever. Fill in the blank.

3 And then you would go to Attorney Commisso  
4 and say, "They want this. Can we give it to  
5 them?"

6 And he'd say "yes" or -- well, he always  
7 said yes. Can you say that he always said  
8 "yes" and he never said, "No, we're not giving  
9 that to you," or do you know?

10 A. I don't recall any instances where he said,  
11 "Don't share that," no.

12 Q. So if the Government was looking for it, he  
13 always shared it; correct?

14 A. As long as it was in his -- if there was no  
15 privilege issue, then, yes, it would be shared.

16 Q. And are you aware of Attorney Commisso  
17 asserting a privilege to something that you  
18 thought the Government should have?

19 A. No.

20 Q. So you're their expert witness, and they say,  
21 "We need this information."

22 And you go to Attorney Commisso and say,  
23 "Hey, we need to share this information."

24 And he says, "Yes," every time you  
25 remember?

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1 A. Yeah. I mean, that's my recollection  
2 generally. And I don't determine what's  
3 privileged. I mean, that's -- well, everything  
4 I did with him was privileged; right? So  
5 determining what was a -- can be waived -- I  
6 viewed that as his role.

7 Q. And so -- but he ultimately would be the  
8 gatekeeper as to what the Government would get  
9 from you in your role as an expert for the  
10 Government?

11 A. Correct.

12 Q. So when you were working for the Government,  
13 the Government was giving you instructions;  
14 right?

15 They've retained you, and they'll say, "We  
16 want you to write a report about 'X,' 'Y,' and  
17 'Z'"; right?

18 A. Correct.

19 Q. And during that same period of time, you're  
20 also working with Attorney Commisso to protect  
21 the privilege of United Way and protect their  
22 interests; correct?

23 A. Yes. There's multiple work streams, multiple  
24 different tasks that were assigned as part of  
25 making sure we didn't cross wires in everything

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1 we shared.

2 Q. But they were similar objectives; right?

3 A. Similar objectives between...

4 Q. To help the prosecution of the case against  
5 Mr. Alrai?

6 A. So the objective with working for the U.S.  
7 Attorney's Office was to prepare a loss  
8 quantification, right, and an unjust  
9 enrichment. And we assumed, right -- or I  
10 guess I assumed that a fraud occurred.

11 With respect to United Way, we were  
12 assisting with various fact-finding. People at  
13 RSM were doing discovery services. We had a  
14 variety of different roles. We were assessing  
15 internal controls and vulnerabilities to them.

16 So there was a number of various, quote,  
17 unquote "objectives" that were quite dissimilar  
18 and unrelated to --

19 Q. But one of those objectives was to determine a  
20 loss -- to quantify loss regarding the  
21 allegations against Mr. Alrai; right?

22 A. Correct. That included the loss  
23 quantification, yes.

24 Q. And as we saw from the report to the  
25 United Way, one of the objectives was to

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1 recover that loss through the criminal  
2 prosecution?

3 A. Correct.

4 Q. So that objective was identical; correct?

5 A. Well, that was United Way's -- I think you said  
6 United Way's goal -- objective?

7 Q. Well, you're working for two entities in this  
8 case. So you worked for United Way, who is  
9 identified as the victim in this case; correct?

10 A. Correct.

11 Q. And you've worked for the Government, who is  
12 the prosecution in this case; correct?

13 A. Correct.

14 Q. So you have worked for both of them.

15 And both of them have an identified  
16 interest in getting money from Mr. Alrai  
17 through the criminal prosecution?

18 A. Correct.

19 Q. That's the same for both United Way and the  
20 Government?

21 A. That's my understanding yes.

22 Q. Now, in addition to your work for the  
23 Government as an expert witness and your work  
24 of writing a report for the United Way, you  
25 also helped put together an investigation for

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1 an insurance claim that the United Way made  
2 regarding the facts in this case; correct?

3 A. There's an insurance claim, yes.

4 Q. And you're working on that back in the fall of  
5 2018 as well, when you were still working for  
6 United Way?

7 A. That's correct.

8 Q. And we saw a little bit about that in that  
9 slide we pulled up when we first started  
10 talking about -- that was one of the potential  
11 sources of recoveries -- was this insurance  
12 claim; correct?

13 A. Correct.

14 Q. And if I read that slide correctly, was the  
15 insurance claim on employee theft capped out at  
16 \$1 million?

17 A. That's my recollection, yes.

18 Q. So I want to ask you about that insurance  
19 claim.

20 You helped come up with some of the  
21 numbers and the calculations that were put into  
22 that claim; correct?

23 A. That's correct, yes.

24 MS. BROWN: If we can pull up Exhibit Ww,  
25 specifically at page four.

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1 (Pre-marked Defendant's Exhibit Ww  
2 introduced.)

3 Q. (By Ms. Brown) So we'll start at the  
4 beginning -- it says "Insured Proofs of  
5 Loss" -- and then we'll go to four.

6 Do you recognize this document?

7 A. Starting on page four, yes, it looks familiar.

8 Q. And I'm going to specifically ask you about --  
9 actually, if you can go back one page. I think  
10 it might be at the bottom of the previous page  
11 that I was going to ask about. Sorry. Okay.

12 At the bottom, Tracy, if you can pull out  
13 that bottom paragraph above the footnote  
14 section. Thank you.

15 And it says, "United Way has various  
16 controls in place to prevent misconduct,  
17 including potential employee theft; however,  
18 Alrai circumvented these controls and the  
19 controls in place. And the associated breaches  
20 of such controls by Alrai included, but are not  
21 limited to" -- and now we can go to the next  
22 page.

23 And then it describes the actions of  
24 Mr. Alrai in page four; correct?

25 A. It appears so, yes.

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1 MS. BROWN: And just for the Court's  
2 summary, this document was produced prior to  
3 trial. I know the sections before, I was  
4 talking about invoicing. That was not -- none  
5 of the invoices that we referenced were  
6 produced prior to trial.

7 So I'm going to go on to the next exhibit,  
8 which is Exhibit Z.

9 Q. (By Ms. Brown) This is back -- we talked  
10 about this at the beginning of your  
11 examination. This is the report you did for  
12 the United Way. And I'm going to go page 32.  
13 I think we're at page 30 now. Yeah, 32.

14 So one of the things in the report for the  
15 United Way was something that was called "root  
16 cause analysis"; correct?

17 A. Correct, yes.

18 Q. And if we look on this page at B, one of the  
19 things -- root cause analysis means "why did  
20 this happen? Why did this alleged theft happen  
21 to United Way"; correct?

22 A. Correct. Yes.

23 Q. And section B, the answer is "lack of adherence  
24 to RFP policies and procedures. Explaining RFP  
25 policies and procedures appear to be poorly



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1 drafted and communicated and were circumvented.  
2 The RFP process was overridden, circumvented in  
3 five key instances."

4 It explains that "managed IT services, RFP  
5 service did not have clearly documented RFP  
6 procedure requirements or adequate technical  
7 oversight"; do you see that?

8 A. Yes. Correct.

9 Q. And then the next sections talk about "there's  
10 no evidence of an RFP for telephonic services  
11 which were awarded to DigitalNet"; correct?

12 A. Correct. Yes.

13 Q. And section three says "no evidence of an RFP  
14 for infrastructure hosting and virtual desktop  
15 services order to DigitalNet, and failure to  
16 identify duplication of services with those  
17 performed by DigitalNet." That's included in  
18 that report as well; correct?

19 A. That's correct.

20 Q. And, finally, "No evidence of an RFP for ad hoc  
21 web development services all awarded to  
22 DigitalNet"; correct?

23 A. Correct.

24 Q. So in this report that you gave to the  
25 United Way, you found serious problems with the

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1 RFP policies and procedures at United Way  
2 during Mr. Alrai's tenure; correct?

3 A. That's correct, yes.

4 Q. Those serious concerns about United Way's RFP  
5 policies and procedures did not make their way  
6 into the insurance request for the insurance  
7 claim, did they?

8 A. I'm not sure.

9 Q. Well, we just read from that which is  
10 Exhibit Ww that United Way's policies and  
11 procedures require due diligence be performed  
12 to obtain information about prospective  
13 vendors.

14 That doesn't sound like, at least as to  
15 what you're saying to the insurance company,  
16 that there were any problems with United Way's  
17 RFP process, does it?

18 A. Well, that's a statement, right, of fact with  
19 respect to what the requirements were, yes.

20 Q. Okay.

21 A. And this is a statement of fact to where some  
22 of the gaps occurred.

23 MS. BROWN: So I'm going to ask -- Tracy,  
24 bring up exhibit --

25 THE COURT: Wait a minute.

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1           So, Ms. Brown, this document -- I'm a  
2           little bit -- I just got confused.

3           MS. BROWN: Oh, good. I'll try to  
4           clarify.

5           This was produced prior to trial,  
6           Your Honor. So this is what I just talked  
7           about -- which is Z was produced prior to  
8           trial. It basically was the report that RSM  
9           gave to United Way regarding their  
10          investigation.

11          The document right before that was a  
12          document that was sent to United Way's  
13          insurance company asking for claims. Both of  
14          these were provided to counsel before trial.  
15          They establish the foundation for the next  
16          document I'm going to, which was not produced  
17          prior to trial, which is Exhibit Oo. So I'm  
18          glad you asked that just so I could clarify.

19          THE COURT: But you were just asking her  
20          about whether it was -- I don't know -- relied  
21          on, considered, produced, I don't know what --  
22          with respect to the insurance coverage issue.

23          MS. BROWN: Well, I think what the Defense  
24          is arguing is that there are different reports  
25          finding different things, and that that would

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1 go to the credibility of this witness.

2 THE COURT: Okay.

3 MS. BROWN: Because one report doesn't  
4 mention any problems with the policies and  
5 procedures regarding prospective vendors, and  
6 the other one finds serious problems with those  
7 procedures. So these both were given to  
8 counsel prior to trial.

9 The next document is an email that  
10 discusses these two issues that was not  
11 provided prior to trial; does that make sense?

12 THE COURT: It does.

13 MS. BROWN: So exhibit --

14 THE WITNESS: Just to --

15 MS. BROWN: I'm sorry.

16 THE WITNESS: Can I clarify on the record?

17 THE COURT: Sure.

18 THE WITNESS: So you made reference to the  
19 other document being drafted by RSM. That's a  
20 document that came from United Way.

21 MS. BROWN: And by "United Way," do you  
22 mean Attorney Commisso?

23 THE WITNESS: Correct, yes.

24 MS. BROWN: Thank you for clarifying that.

25 THE COURT: Well, did you have any role in

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1 drafting that document?

2 THE WITNESS: We did, yes. We shared  
3 information that went into the formation of the  
4 document, including the loss analysis.

5 THE COURT: The one that went to the  
6 insurance company?

7 THE WITNESS: The calculation, yes -- the  
8 loss calculation.

9 THE COURT: Yeah, the document we were  
10 just talking about?

11 THE WITNESS: Correct, yes.

12 THE COURT: Okay.

13 Look, it's been 90 minutes for the  
14 reporter, so we're going to take the normal  
15 break. Just to let -- I want to have a brief  
16 conversation, though, with Counsel about this.

17 So we'll take a 15-minute break and then  
18 we'll reconvene. I've got a 12:30 meeting  
19 today, so you should plan your lunch hours for  
20 12:30, about an hour for lunch.

21 Let me ask a question here, though,  
22 Ms. Brown. And I don't quibble at all with  
23 your presentation. But I have to wonder out  
24 loud, I just -- I understand you're trying to  
25 meet your burden. You're trying to show that

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1 evidence was exculpatory that should have been  
2 produced. And, B, because it goes to  
3 credibility, both in terms of competency and  
4 bias. And, B, that it was prejudicial; right?

5 I guess what I'm wondering is this.  
6 Because you're obviously very much in the  
7 weeds, and I really don't have a problem with  
8 that. But what would be the difference --  
9 like, suppose I granted your motion, and then  
10 we either had a new trial or we took  
11 Mr. Hunter's proposal and we had a do-over on  
12 some witnesses, whether it was just cross or  
13 directed cross; right?

14 I guess the question is, what would be the  
15 difference between what you're doing today and  
16 what that proceeding would look like? It  
17 sounds like you'd do the exact same thing;  
18 right?

19 MS. BROWN: Correct, Your Honor, except  
20 now we're going to have -- so, two things.  
21 It's a real easy -- so one thing that would be  
22 different is now we're going to have ammunition  
23 to impeach this witness that we didn't have.  
24 And the second part of that, which is our next  
25 witness, which is our expert, who will say

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1 several things, and we anticipate will say --

2 THE COURT: I don't want you to proffer  
3 what the expert's going to say.

4 MS. BROWN: Oh. Okay.

5 THE COURT: Oh, actually, wait a minute.  
6 The experts can listen to each other, so it's  
7 fine. But here's my point again.

8 Same question, though; right? Because now  
9 you have what you call the "ammunition," which  
10 would be the discovery; right? But, again, how  
11 is it going to look any different than what you  
12 just did? The only reason I ask -- it's really  
13 not a critique, because it's interesting  
14 information -- it really is.

15 But I guess it's almost a situation where  
16 there's an analogy to the Suzanne Brown case.  
17 You called your expert. I heard what she said.  
18 And I've got to make a decision about whether  
19 it would affect the outcome; right? And in  
20 this case, it's even closer to the road,  
21 because I'm the trier of fact.

22 And it's not meant to be a challenging  
23 question, or even rhetorical, but what you  
24 would do at trial is what you're doing right  
25 now; right? Because you have the ammunition

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1           now.

2                   MS. BROWN: Yes. Right. And that's our  
3           burden of showing how it could have been a  
4           different result -- is by going through this  
5           witness and showing the things that we weren't  
6           able to show.

7                   THE COURT: I'm just wondering -- I'm just  
8           wondering if there's a different way to do it,  
9           only because -- it's very important, but it's  
10          also very time-consuming. And if this is going  
11          to be exactly what happens again if I grant the  
12          motion, I just wonder if there's a shorter way  
13          to do it. That's not to suggest, though, that  
14          I know what it is, because I don't.

15                  I want Counsel to think about that maybe  
16          over the break. It doesn't have to be over the  
17          morning break. We can talk about it over lunch  
18          or something. But this seems like a process  
19          that is kind of -- it's not just a peek into  
20          what should have been -- allegedly should have  
21          been produced and its impact. It's literally  
22          the entire proceeding, which -- sounds like we  
23          would almost just do over again, or just use  
24          the record of this proceeding.

25                  It's a strange kind of procedural posture



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1 we're in here, and perhaps Counsel will have a  
2 suggestion for the Court. I'm not asking you  
3 to do it right now. We'll take a 15-minute  
4 break. And then, again, assume a 12:30 lunch  
5 break.

6 We're in recess for 15 minutes.

7 (Brief recess taken at 10:47 a.m., and the  
8 proceedings resumed at 11:04 a.m.)

9 THE COURT: Back on the record.

10 Defense Counsel, you may proceed.

11 MS. BROWN: If we can pull up Exhibit Oo.

12 (Pre-marked Defendant's Exhibit Oo  
13 introduced.)

14 Q. (By Ms. Brown) And just to give some context  
15 both to the Court and Mr. Naviloff, before the  
16 break, we spoke about -- one of the duties that  
17 RSM and yourself had for United Way was putting  
18 together a report that was submitted on an  
19 insurance claim; correct?

20 A. Sorry.

21 Is that question for me?

22 Q. Yes. I was just giving some context where we  
23 are -- that we had talked about the insurance  
24 claim that RSM assisted Attorney Commisso in  
25 terms of submitting to the insurance company.

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1 A. Yes. That's our last discussion, yes.

2 Q. So in the context of that, I'm going to ask you  
3 about an email exchange that is documented in  
4 Exhibit Oo.

5 And just for the Court's benefit, this is  
6 a document that was not produced prior to  
7 trial. It was produced as part of the Court's  
8 recent discovery order.

9 So this document we're looking at is from  
10 Ryan Gilpin -- at least the last email that  
11 we're looking at at the top. And it's to  
12 yourself, and Chris Fitzgerald, and Ron Nahass  
13 -- is that how he pronounces it?

14 A. Nahass is, yep, correct.

15 Q. And these are the team people at RSM who were  
16 working on the United Way case involving  
17 Mr. Alrai; correct?

18 A. Yes, that's correct.

19 MS. BROWN: So I'm going to ask the clerk  
20 to scroll down to get to the beginning of this  
21 email exchange here. So it would be -- go back  
22 one page. Okay.

23 Q. (By Ms. Brown) So this email exchange starts  
24 with an email from another accounting firm;  
25 correct?

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1 A. That's correct, yes.

2 Q. And so on page three of Exhibit Oo, this is an  
3 email from this other accounting firm -- that  
4 they are representing Chubb insurance company  
5 regarding the claim of United Way in terms of  
6 the theft claim; correct?

7 A. That is correct, yes.

8 Q. And the accounting firm that's representing  
9 Chubb sends this email to Attorney Commisso.

10 And it says that "Good afternoon, John.  
11 As you may be aware, we were the forensic  
12 accountants retained by Kimberly Russell of  
13 Chubb to assist in the analysis of the  
14 above-captioned matter. Based on our analysis  
15 of the documentation provided to date, we  
16 attached our follow-up request letter. If you  
17 have any questions or comments, please feel  
18 free to contact me"; correct?

19 A. Correct.

20 Q. So that wasn't sent to you, but indirectly it  
21 was, because then Attorney Commisso forwarded  
22 it to you, correct, by email?

23 A. Yes. That's correct.

24 Q. And if we can go back a page, which would be  
25 page two of Exhibit Oo. So he, on this page at

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1 the bottom of the page -- this email's being  
2 forwarded to you.

3 And so he explains he's forwarding this  
4 letter from the accountants for Chubb about  
5 reviewing the proof of loss claim; right?

6 A. That's correct, yes.

7 Q. And it says, "As you can see from the letter,  
8 several requests for further documents,  
9 analysis, and information about RSM's loss  
10 calculation. It appears they are auditing  
11 RSM's work as well as United Way's internal  
12 controls"; correct?

13 A. That's correct.

14 Q. And Attorney Commisso goes on to say, "Please  
15 review and let me know when you are available  
16 to call to discuss"; correct?

17 A. Correct.

18 Q. And "we would like you to put together a plan  
19 to prepare a response. We need to understand  
20 the most efficient division of labor and who --  
21 we need to budget for anticipated cost";  
22 correct?

23 A. Correct.

24 Q. And after that, Attorney Commisso says that  
25 "the total spend for the IT investigation is

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1 over \$1 million"; right?

2 That's what that says; right?

3 A. Correct.

4 Q. You understand that he's saying, "We've already  
5 spent \$1 million on the investigation in this  
6 case. We need to start budgeting here,"  
7 basically; is that how you took that email?

8 A. I took this email as he was looking for a  
9 budget for the response to this inquiry.

10 Q. And then if we can go to the top of that email,  
11 that same page would then be an email that --  
12 so did you forward this email to the rest of  
13 your team? Or was this -- let me see.

14 It looks like you're the only one from RSM  
15 copied on the email from Attorney Commisso;  
16 correct?

17 A. Correct.

18 Q. So if we can go back a page to the first page  
19 of this document, Oo.

20 So it looks like you then forwarded to  
21 your team, who is Chris, Ryan, and Ron;  
22 correct?

23 A. Correct.

24 Q. Diego Rosenfeld isn't on that team, is he?

25 A. He's not on this email.

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1 Q. And so you direct that email to your team at  
2 RSM, including Ryan Gilpin; right?

3 A. Correct.

4 Q. And you tell them that "we will need to come up  
5 with an estimate of hours, pulling information  
6 requested by forensic accountants hired to  
7 examine United Way's claim."

8 So you're directing them that they need to  
9 put together a budget to shore up this claim;  
10 correct?

11 A. We need to come up with an estimate of hours to  
12 collect information that they're looking for.

13 Q. And you put that in different categories;  
14 correct?

15 A. Where do you see that?

16 Q. Well, let's pull out the paragraph -- the  
17 second paragraph from the bottom on the page  
18 we're on right now, which is page one.

19 And it says "duplicate billing."

20 A. Uh-huh.

21 Q. So there you instruct your team to "please  
22 explain how it was verified that DigitalNet did  
23 not perform any of the services claimed as  
24 duplicative billings. CF" --

25 I'm assuming that's "Chris Fitzgerald"?

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1 A. Yes. Well --

2 Q. Sorry -- what?

3 A. So this section is -- if you read above, this  
4 is where I said we need to potentially prepare  
5 some written explanation in response to,  
6 presumably, some of the forensic accountant's  
7 questions that were asked.

8 Q. So you, as to the issue of duplicate billing --  
9 so they must have had questions about your  
10 claim of duplicate billing; correct?

11 A. Yes, but that's my understanding here. I  
12 haven't seen the file that was potentially  
13 attached to this or associated with this.

14 Q. We don't have it either. Otherwise, I'd show  
15 it to you.

16 So you direct your team to "please explain  
17 how the document billing was verified that  
18 these services were not performed." And you  
19 specifically direct CF, being Chris Fitzgerald,  
20 "this will be a quick, straightforward  
21 explanation"; correct?

22 A. Correct.

23 MS. BROWN: Tracy, if we can go down in  
24 the next paragraph that start with "Excessive  
25 billing."

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1 Q. (By Ms. Brown) So in this paragraph of your  
2 instructions to your team -- and I'm assuming  
3 "6A" is referencing this letter that we don't  
4 have -- "detail how the monthly office phone  
5 line count was determined for FY 2013 through  
6 2018. Please provide any and all supporting --  
7 documenting the phone count for each year."

8 And it says "Greg." Are you directing  
9 that to yourself, or...

10 A. Yeah, I'm not sure on this, based on this.

11 Q. I'm not either. That's why I'm asking.

12 So it says "Greg, don't think we know  
13 this, but can indicate how the phone line count  
14 compared to head count."

15 Do you know what that's talking about  
16 there, when it says "phone line count compared  
17 to head count"?

18 A. Yeah. I think there was some initial question  
19 as to -- before the facts were gathered as to  
20 how we knew it, and whether or not we had  
21 the -- a phone line count or head count. But  
22 it appeared that Chris Fitzgerald said they  
23 used a number of phone lines that were stated  
24 on DigitalNet invoices. So the basis for which  
25 the calculation was calculated was known to



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1 Chris.

2 Q. Chris Fitzgerald was doing the calculation as  
3 to whether there was excessive billing as to  
4 the phone services?

5 A. Chris was familiar with the model, and this was  
6 my attempt to have someone quickly look at the  
7 model and pull out the answers to these  
8 questions. So Chris went back to the model and  
9 pulled out these answers.

10 Q. And Chris is not an IT guy, for lack of a  
11 better word; right?

12 A. Chris is also a forensic accounting -- he's in  
13 our forensic group.

14 Q. So were you instructing Chris to go back and  
15 get the necessary information regarding the  
16 calculation on the alleged excessive billing as  
17 to the phones? Or is this him giving his  
18 answer to that?

19 A. This is him just going back to our work papers  
20 and pulling in the relevant response for  
21 purposes of responding to the forensic  
22 accountants who were reviewing our claim.

23 Q. And, at least, it sounds here that the way he's  
24 doing that is basically counting up how many  
25 phone lines there are.

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1 A. Correct.

2 MS. BROWN: Tracy, if we can go to the  
3 next page, which, I guess, would be page two of  
4 Oo.

5 And pull out the first half of it,  
6 basically up until "RSM."

7 Q. (By Ms. Brown) So Ryan Gilpin is on this  
8 exchange as well; correct?

9 A. Yes.

10 Q. And he sends an email saying he's "attached his  
11 initial draft of a memo on data management and  
12 backup that I believe Chris had later refined";  
13 correct?

14 A. Correct, yes.

15 Q. And so this email tends to suggest that Ryan's  
16 doing the calculation and the comparisons  
17 regarding data management and backup; correct?

18 A. I think this refers to the scan that was done  
19 and the analysis related to observing whether  
20 or not there were backups. So I think he had  
21 jotted some notes with respect to what was  
22 being backed up and made it available to Chris,  
23 again, to the extent he didn't already have  
24 some notes in his files.

25 Q. So it doesn't say "notes."

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1           It says "draft of a memo"; right? We  
2           agree that that doesn't say "notes" -- it says  
3           "draft of a memo"?

4   A.    Yep. Correct.

5   Q.    And it says "draft of a memo on data management  
6           and backup"; correct?

7   A.    Correct.

8   Q.    And it sounds like from this that Ryan Gilpin  
9           is the one who's writing that draft of a memo  
10          on data management and backup; right?

11   A.    That's correct, yes.

12   Q.    It sounds like Chris refined it later; right?

13   A.    It says, I believe, "Chris had refined,"  
14          meaning this may have been an old draft of  
15          something that Chris had looked at.

16                This appears to be just transient  
17                communications with respect to discussions that  
18                went into formulating, ultimately, the claim  
19                that was presented.

20                MS. BROWN: Tracy, can we go back to page  
21                three of Exhibit O?

22                And can we pull out that paragraph that  
23                says "Services not performed," not quite  
24                halfway down? Thank you.

25   Q.    (By Ms. Brown) So, again, this is still that

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1 exchange going on regarding the insurance  
2 company request.

3 And it has an "8." Again, I'm assuming  
4 that corresponds to a letter.

5 It says, "Please explain how DigitalNet  
6 invoiced costs of \$592,250 for data management  
7 and high-availability backup storage, paid  
8 during FY2013 through FY2018, were determined  
9 to have been performed."

10 That sounds like that's what the insurance  
11 company's accountants are asking for; right?

12 A. Yes. They're specifically asking us for  
13 information on this. This is one where we  
14 ultimately determined from John Meyer, CVS  
15 consulting, that -- his opinion was these were  
16 rendered, which was consistent with our initial  
17 assessment throughout this process.

18 And it looks like Ryan emailed around  
19 making reference to the explanation. I think  
20 that's what was attached that you were  
21 sharing -- that he had some explanation as to  
22 what we had seen through the scans, which were,  
23 once again, made available -- showing that  
24 scans weren't being captured of the IT  
25 environment.

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1           And then it says -- Chris replies -- CF  
2           says, "Yes, I believe we have an explanation  
3           somewhere in the files."

4           And "Ryan, would you be able to find this  
5           explanation and circulate?" So it looks like  
6           there was discussions and documents that were  
7           transient in nature with respect to information  
8           that they had to dig up and share.

9       Q.    So I just want to understand this.

10           So if I understood your explanation  
11           regarding this issue, Ryan interviewed  
12           John Meyer about this topic. Then Ryan  
13           generated a report about that and circulated it  
14           to the rest of you. That became part of your  
15           findings.

16           Am I getting that correct?

17       A.   For purpose of this analysis, we -- I don't  
18           know what, ultimately, was shared with the  
19           forensic accountants here, but my recollection  
20           here is that, yes, we had interviews with  
21           John Meyer. John Meyer's recollection of -- or  
22           views with respect to high-availability backups  
23           aligned with our analysis and the network scan  
24           that was explained to me and shown to me. And  
25           that it was my opinion, for purposes of

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1 preparing information for these forensic  
2 accountants, that the high-availability backup  
3 storage did not take place, according to  
4 John Meyer and the documents that were  
5 explained to me with respect to --

6 Q. So are there documents somewhere that  
7 memorialize what John Meyer told you about this  
8 data management high-availability backup  
9 storage?

10 A. My understanding is there was a number of  
11 informal conversations that we had with  
12 John Meyer. I know that, generally speaking,  
13 we had spoken with him on a number of  
14 occasions.

15 So -- and I know, as a matter of all of  
16 our interviews, we didn't maintain formal  
17 notes. So those would have been transient in  
18 nature. Any relevant information would have  
19 made their way into one of these reports, as  
20 far as any indication of what we learned or  
21 found that was relevant to our overall  
22 conclusions.

23 Q. And that's what I understood you to say a few  
24 minutes ago -- that the interviews with Meyer  
25 on this issue were memorialized in a report

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1           that Ryan did that was emailed around to  
2           everyone explaining this issue.

3                     Was that -- I'm just trying to understand  
4           that. Is that what happened?

5       A.   No. I mean, I remember seeing a network scan  
6           that showed there were two servers that were  
7           backed up. And just about everything else was  
8           a two out of -- I think there was a number on  
9           it in an email that he sent me.

10                    And then with the desktop, similar -- it  
11           was some count out of a much larger count that  
12           may have received some sort of backup. But the  
13           way it was explained to me is that there was no  
14           software found that was backing up any of the  
15           networks on a real-time basis. And, certainly,  
16           for purposes of geographically dispersed high  
17           availability, the threshold wasn't being met in  
18           terms of what we found as evidence in the  
19           files.

20                    So these were largely verbal discussions  
21           that I had, or an email or two that showed me  
22           the accounts combined with the report that was  
23           shared with the Defendant which shows the scan  
24           that took place. And whether that was Meyer  
25           that did the scan or whether that was our

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1 software, I don't recall at this moment. But  
2 the scan was part of what was shared with me,  
3 along with John Meyer's conclusions on this.

4 Q. So John Meyer isn't mentioned anywhere in this  
5 paragraph, is he?

6 A. In this paragraph?

7 Q. No.

8 A. Not this specific one, no.

9 Q. Because if you read this paragraph, it sounds  
10 like Ryan Gilpin is in charge of emailing  
11 around an explanation about how he became aware  
12 of this problem; right?

13 A. Well, yes, Ryan is emailing us with respect to  
14 high availability and what he had seen in terms  
15 of his fact-finding. And with that, the basis  
16 of his analysis was a high -- or a report -- a  
17 network scan that showed what was being backed  
18 up and what wasn't. And those key data points  
19 were shared to me via email.

20 Q. And -- but the analysis was done by  
21 Ryan Gilpin; right?

22 A. Like, what analysis?

23 Q. I thought you just said that he did the  
24 analysis of this issue and sent you an email on  
25 it.



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1 A. Sorry.

2 The summary -- summary of the snapshot of  
3 what was being backed up. Summary analysis?

4 Q. Oh, you didn't want "analysis"?

5 A. "Analysis" is fine.

6 Q. Okay. Because that's what I thought you said.

7 So this is all after you get this question  
8 from the insurance company to have more  
9 documentation about your claim losses; right?

10 A. Correct.

11 Q. Now, this document, Exhibit O -- this was  
12 not -- as far as you know, was not shared with  
13 the Government or the Defense prior to trial;  
14 right?

15 A. This is part of, I'm guessing, the 600-plus  
16 emails that were turned over.

17 Q. After trial; right?

18 A. Yes.

19 Q. Yes, you are right. It was part of the  
20 600-plus emails that were turned over after  
21 trial.

22 But my question was, as far as you know in  
23 your role as the expert for the Government,  
24 this was not turned over prior to trial; right?

25 A. Correct. With respect to the 600-plus, we

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1       opted for an openly conservative approach,  
2       where we produced anything and everything that  
3       related to our work to date. And that included  
4       transient emails such as this one, that  
5       contained some of our thoughts and impressions  
6       at the time that we were preparing some drafts.

7       Q. Well, this email is more than just thoughts and  
8       impressions. This email is that an insurance  
9       company does not think you have given  
10      sufficient documentation for your claims of  
11      loss.

12             That's kind of a significant email;  
13      wouldn't you agree?

14      A. I wouldn't interpret it that way, no.

15      Q. How would you interpret it?

16      A. They were looking for further detail with  
17      respect to the report we shared. So it's part  
18      of a back-and-forth with any insurance claim.  
19      There's going to be questions. So you're not  
20      going to prepare a claim for a \$1 million-plus  
21      dollars with an insurance carrier without them  
22      asking you questions.

23      Q. But, again, you didn't share this with the  
24      Government prior to trial; correct?

25      A. That is correct.

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1 Q. And you didn't share the fact that some of the  
2 persons who are doing the analysis on  
3 explaining these issues, such as services not  
4 provided, was a new associate; correct -- you  
5 didn't share that with the Government either?

6 A. Define "new associate."

7 THE COURT: Everybody, let's not jerk each  
8 other around. Let's just ask questions and  
9 answer them. We all know what we mean. Let's  
10 not play games.

11 THE WITNESS: Okay. So, say, Ryan Gilpin.

12 Q. (By Ms. Brown) So you would agree he would fit  
13 the definition of a young associate at your  
14 firm?

15 A. Yeah, he's a second-year associate. I believe  
16 he was promoted to senior associate at this  
17 time.

18 Q. And you did not share with the Government the  
19 fact that when you were questioned about some  
20 of the findings, that you relied on Ryan Gilpin  
21 to make some of that analysis?

22 A. The work performed is all under my supervision  
23 and under my quality control. This is an area,  
24 particularly with respect to the loss claim,  
25 that I explicitly state in the report and

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1       stated at testimony that John Meyer had  
2       testified and opined on this. And this is part  
3       of my reliance on my expert report.

4       Q. But my question was, you did not share with the  
5       Government that you relied on Ryan Gilpin to  
6       make some of the calculations in this case?

7       A. I didn't rely upon Ryan to make any  
8       calculations. He worked under my direction and  
9       control. Calculation is mine. I prepared it.  
10      And I presented this loss analysis; right. So  
11      Ryan assisted with gathering evidence and facts  
12      and putting them into spreadsheets for me to  
13      review and to perform quality control  
14      procedures.

15               THE COURT: Attorney Brown, let me just  
16      ask you, because we've been on this issue here  
17      for a while. Other than Gilpin's undisclosed  
18      role, is there anything more I'm supposed to be  
19      gleaning from this?

20               MS. BROWN: I think this document is  
21      exculpatory on several levels: That the RSM  
22      was questioned regarding their documentation.  
23      And that in the -- when Mr. Naviloff sought  
24      help to shore up this documentation, he didn't  
25      go to the person with 20 years' experience --

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1 he went to the person with two years'  
2 experience.

3 We'll come back to this again when our  
4 expert testifies. He'll explain a little bit  
5 more about some of this. So I just wanted to  
6 set that up, but they'll be more on that  
7 through our expert later.

8 THE COURT: I know. But we don't have a  
9 jury here, so I'm just asking you questions.

10 MS. BROWN: No, that's great.

11 THE COURT: And I think I understand.

12 So it's not just Gilpin's role, which was  
13 unknown to defense counsel when he  
14 cross-examined this witness; but it's also the  
15 idea that there was some pushback from the  
16 carrier regarding the loss amount; right?

17 MS. BROWN: Correct. And, also, this  
18 document gives us a little bit more -- lack of  
19 a better word, peek behind the curtain as to  
20 how these opinions were formed, which will  
21 become more important with our expert.

22 Q. (By Ms. Brown) I think we talked about this a  
23 little bit before, so I'm not going to go into  
24 a lot of detail.

25 But you were involved in the discovery

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1 process in this case in terms of giving  
2 documents to the Government; correct?

3 A. That's correct, yes.

4 (Pre-marked Defendant's Exhibit X  
5 introduced.)

6 Q. (By Ms. Brown) And I want to talk about  
7 Exhibit X, which is an email where you and  
8 members of your team talk with  
9 Attorney Commisso about the presentation to the  
10 United Way that we discussed earlier. So  
11 that's in Exhibit X. Now if we could pull up  
12 the first sentence beyond the caption of the  
13 parties in the email.

14 It says "happy to discuss."

15 So in this part of the email, it says --  
16 and we'll get to it in a minute, but it says,  
17 "Happy to discuss. Perhaps as much a question  
18 of privilege and what would be available to  
19 Imran if he is charged and requests docs as  
20 part of discovery."

21 That is something -- so would it be fair  
22 to say that based on this email, you were  
23 thinking about what Mr. Imran might or might  
24 not get if you produced documents to the  
25 Government?

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1 A. No. My concern here is my team was discussing  
2 content for purposes of presentation, where  
3 that fell upon John Commisso --  
4 Attorney Commisso to determine what was being  
5 presented to whom. Because there's various  
6 constituents -- different special committees  
7 and different committees that information was  
8 being presented to.

9 So it had everything to do with letting  
10 Attorney Commisso decide what information was  
11 being shared with whom, particularly since some  
12 of those -- at least my understanding was some  
13 of those individuals were further from the  
14 special committee that was charged with our  
15 oversight -- the investigational oversight --  
16 being clear to my team that some people are  
17 going to receive information who may be outside  
18 the sphere of privilege.

19 Q. But you knew that if you shared certain  
20 information, Mr. Alrai would get that  
21 information; correct?

22 A. Not necessarily. I'm just making clear that  
23 the word -- matters of privilege fall upon  
24 Attorney Commisso to decide. And that comes  
25 down to what information he wants to share.

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1 Q. You discussed earlier that Attorney Commisso  
2 never said, "Oh, I'm worried that the  
3 Government might get this and it might help the  
4 Government's case"; he never said that, did he?

5 A. No. No, he didn't express any concern with me  
6 with respect to any specific document during  
7 the course of our work. I believe he trusted  
8 us to mark things as privileged and  
9 confidential, which we did, and allow him to  
10 determine in terms of content for the various  
11 constituents what information went into those  
12 presentations.

13 Q. This is dated October 4, 2018; correct?

14 A. Correct.

15 Q. And we -- from a previous email, Mr. Alrai  
16 didn't get indicted until -- I think it was  
17 November 28, 2018; right?

18 A. Correct.

19 Q. So this is almost two months before he's even  
20 indicted, but you're thinking about what he  
21 might get in discovery; right?

22 A. I'm instructing my team that they should be  
23 mindful of privilege. That's all.

24 Q. If we can get rid of that pullout and go down  
25 in the bottom half of the same page of



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1 Exhibit X.

2 So this is what you were talking about  
3 before -- that you get this email from  
4 Attorney Commisso, and he is basically giving  
5 you feedback on a preliminary version of your  
6 report to United Way; would that be a fair way  
7 to characterize that?

8 A. Correct.

9 Q. One of the things you're discussing here is  
10 something "between a full deck and a thin  
11 deck"; correct?

12 A. That's what Attorney Commisso is discussing,  
13 yes.

14 Q. I mean, that's a fancy way of saying "more or  
15 less information"?

16 A. Correct.

17 Q. I'd like to go to the second page of this  
18 document. So if you can just magnify pretty  
19 much everything there. Yeah.

20 So when he's giving you feedback, he's  
21 going to specific pages on the document you  
22 sent him; right?

23 A. Correct.

24 Q. So he's -- and at the top of this document,  
25 which is X, he refers to page 32, first bullet,

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1 "delete reference to collusion among multiple  
2 individuals. Change to 'Alrai executed a  
3 complex fraud scheme which included gaining  
4 trust and deceiving multiple individuals.'"

5 That was something that Attorney Commisso  
6 told you to change; right?

7 A. Correct. Yes.

8 Q. And you did change it; right?

9 A. Yes.

10 Q. You used the exact language that he told you to  
11 use?

12 A. This is an instance where the word "collusion"  
13 could be confused in terms of -- internal  
14 collusion, I think, was his point. So I made  
15 the changes. I thought it was misleading.

16 Q. But he added more of -- making it sound like  
17 this is all Mr. Alrai who executed this complex  
18 fraud scheme.

19 That was language he told you to use as  
20 well; correct?

21 A. I don't know what the specific changes were  
22 here. I think the concern was the word  
23 "collusion." I'd have to look to see what  
24 changed between versions. But the indication  
25 here is that there was no known collusion or

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1 evidence of collusion by United Way employees;  
2 right? So by using that word, it would be  
3 confusing to the reader of this report, so it  
4 should be clear.

5 Q. And so you made the changes that  
6 Attorney Commisso told you to make; correct?

7 A. Yes, we made that change.

8 Q. And then you submitted the report with the  
9 changes that were made; correct?

10 A. Correct.

11 Q. Now, this email here that we've just gone  
12 through -- that was an email that was not  
13 shared with either the Government or the  
14 Defendant prior to trial; correct?

15 A. As part of our discovery, this is part of our  
16 efforts to turn over every -- any and all  
17 documents and communications that may be  
18 relevant, beyond what may have specifically  
19 been responsive to what had been requested  
20 before.

21 Q. And this was not turned over prior to trial?

22 A. I'm not aware that it was.

23 MS. BROWN: Tracy, can you pull up  
24 Exhibit D?

25 (Pre-marked Defendant's Exhibit D

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1 introduced.)

2 MS. BROWN: And if you can go to the last  
3 page on that, we'll sort of work our way  
4 forward with the email exchange here. Okay.

5 Q. (By Ms. Brown) So this email starts out with  
6 an email from Attorney Hunter of the U.S.  
7 Attorney's Office.

8 And it is to "Tim." And as you'll see  
9 from the next page, it's Attorney Harrington,  
10 who was previous defense counsel.

11 And it says, "Please see the attached  
12 letters regarding the Alrai case. I've also  
13 attached a supplemental production consisting  
14 of Bates numbers" -- I'm not going to read  
15 those out.

16 So this is not an email initially  
17 involving you, but at some point it was  
18 forwarded to you; correct?

19 A. Well, you'd have to show me, but, yeah.

20 Q. Okay. Well, let's go back to the page before  
21 this. So then the exchange here is an email  
22 from Attorney Harrington.

23 It says, "Matthew, thank you for the  
24 information. In regard to Mr. Naviloff,  
25 although I appreciate the summary, has he

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1 prepared a report of his filings either for you  
2 or the United Way?"

3 And that is signed, "Best regards, Timothy  
4 M. Harrington"; correct?

5 A. Correct. Yes.

6 Q. And let's go a page before that. So then  
7 Attorney Hunter forwards -- then he has an  
8 exchange with Attorney Harrington about -- the  
9 Government had recently retained you, and that  
10 you had not prepared a report. And he expects  
11 that you will and that they will deliver it  
12 promptly.

13 So there's another email -- we're going to  
14 go back a page -- from Attorney Harrington. So  
15 go back to the page before this -- the one with  
16 all the outline.

17 So then there's a request that's addressed  
18 to John and Matt of the U.S. Attorney's Office  
19 from the defense attorney, saying, "After  
20 reviewing the summary of Naviloff's expected  
21 testimony, I'm requesting the following: All  
22 reports prepared by Greg Naviloff of RSM and  
23 its employees, hereinafter collectively  
24 referred to as 'RSM for the United Way'" --

25 THE COURT: Donna, you've got to take it

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1 easy on the reporter when you're reading stuff  
2 like this.

3 MS. BROWN: Okay. Sorry about that.

4 THE COURT: We can see the document. We  
5 can read it. Maybe just refer to the item  
6 numbers.

7 Q. (By Ms. Brown) Okay. Yeah.

8 I'll refer to item number one of what  
9 we're looking at now, which is D. I think it's  
10 page three. It asks for all reports from RSM  
11 regarding this case.

12 Did you turn over all reports from RSM  
13 regarding this case?

14 A. Which letter are you on? Sorry.

15 Q. Well, A1?

16 A. A1. Got you.

17 Yes, so all that I was aware of, yes.

18 Q. So A2 says "copy of documents and other data  
19 collected and reviewed by RSM in calculating  
20 United Way's loss."

21 Did you provide those documents in  
22 discovery?

23 A. We would have made available the documents for  
24 review, yes -- a copy of all documents  
25 collected and that served as the basis for our

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1 calculation.

2 Q. Well, it doesn't say that served as the basis  
3 for your calculation.

4 It says "reviewed."

5 A. We wouldn't have turned over everything. I  
6 mean, there's GLs and all sorts of information  
7 that was collected as part of this that goes to  
8 the heart of United Way's operations. What was  
9 utilized for the basis of our loss calculation  
10 would have been made available.

11 Q. The 600 emails that were produced after trial  
12 were not made available; correct?

13 A. Yeah. As far as the emails, we opted for a  
14 conservative approach, right, and made  
15 available all these emails, even though, in my  
16 opinion, there's -- only a little number of  
17 these are responsive to the Court's order that  
18 took place. So this was our attempt to  
19 comply with --

20 THE COURT: No, she's asking you about  
21 pretrial.

22 Q. (By Ms. Brown) Yes.

23 A. Not the 600 emails? Sorry, which --

24 Q. I'll rephrase my question.

25 So we were talking about A2 here regarding

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1 documents reviewed by RSM.

2 A. Yeah.

3 Q. What my question was, is that the 600 emails  
4 that we received after trial -- you didn't  
5 produce them before trial, consistent with this  
6 request in number two?

7 A. Yes. Consistent with what I stated there, we  
8 shared everything that was relevant to the  
9 calculation and the making of the calculation,  
10 as well as a discussion with counsel, right, of  
11 available information that was necessary.

12 Q. Well, I think you're answering a different  
13 question than I'm asking.

14 This particular sentence says "documents  
15 reviewed," not "documents relied on" or not  
16 "documents incorporated into." It says  
17 "documents reviewed" --

18 A. Yep. There was discussions --

19 Q. -- you looked at and decided wasn't important.

20 That would be covered by this sentence;  
21 right?

22 A. Yes. And these are items that were discussed  
23 with the U.S. Attorney's Office. They were  
24 made available, or at least known, that we had  
25 general ledgers and all sorts of other



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1 documents that were collected that were part of  
2 United Way's business records; right? That we  
3 performed a lot of collections. And you can't  
4 bifurcate what was collected for purposes of  
5 loss analysis versus the five other reasons  
6 they may have been collected; right?

7 Policies and procedures -- all sorts of  
8 information that may have been part of that  
9 response. So the U.S. Attorney's Office was  
10 made aware and Commisso Law was made aware of  
11 what we had collected or the vastness of what  
12 had been collected.

13 THE COURT: So are you saying that the  
14 U.S. Attorney's Office was made aware that  
15 there were internal emails between you and  
16 other RSM employees discussing these analyses?

17 THE WITNESS: Well, yes, they would have  
18 been aware that emails take place, and that  
19 there's emails discussing analyses, and they  
20 were transient upon preparing our work product;  
21 right -- my final loss calculation.

22 THE COURT: You say they "would have been  
23 aware." I don't know what that means.

24 Were they made aware by you, or were they  
25 not?

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1 THE WITNESS: I don't recall any direct  
2 conversations about transient emails, per se,  
3 that went to my team members in producing those  
4 emails with respect to this.

5 THE COURT: So how would they have known  
6 that? So you just said they would have known  
7 that. I asked you how.

8 And you said, "Well, we didn't talk about  
9 it." So how would they have known that?

10 THE WITNESS: Well, by the nature of my  
11 work, I'm emailing my team every day.

12 THE COURT: How would they know that?

13 THE WITNESS: That's just a normal mode of  
14 communication, I guess. I just assume they  
15 would know that I was emailing my team.

16 THE COURT: That's sensible.

17 What's a "transient email," by the way?  
18 Is that a special kind of email?

19 THE WITNESS: No. As part of the work  
20 performed, there were emails that had mental  
21 impressions or thoughts at certain points in  
22 time. All the relevant information was taken  
23 from those and put into my report.

24 THE COURT: Except information you didn't  
25 deem worthy of being in your report. In other

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1 words, when you read something and you wanted  
2 to rely on it, you put it in the report. But  
3 things you chose not to rely on, you didn't  
4 include in the report; right?

5 THE WITNESS: Yeah. And we discussed  
6 generally whether we needed to do an email  
7 review and turn over emails.

8 THE COURT: Who is "we"?

9 THE WITNESS: Commisso and, I believe, the  
10 U.S. Attorney's Office as well. I can't  
11 remember exact discussions.

12 THE COURT: And you?

13 THE WITNESS: Yeah.

14 THE COURT: Discussed turning over emails?

15 THE WITNESS: We discussed whether or not  
16 this was overly broad to include privileged  
17 emails that happened with Commisso Law with  
18 respect to what's being shared.

19 THE COURT: Look, I don't mean to bear  
20 down on you.

21 THE WITNESS: It's fine. I get it. I  
22 understand.

23 THE COURT: I'm asking you whether you had  
24 conversations -- I'm only using the U.S.  
25 Attorney's Office and Mr. Commisso, because

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1 that's what you said. I don't want to put  
2 words in your mouth because that's the last  
3 thing I want to do.

4 THE WITNESS: No, that's fine.

5 THE COURT: But did you have conversations  
6 with Attorney Commisso in the U.S. Attorney's  
7 Office about the fact that you had internal  
8 emails that you reviewed as part of your work?

9 THE WITNESS: Yes, I would have made it  
10 known that there were emails that had  
11 communications between me and my team that I  
12 considered part of Commisso's discussions --  
13 privileged. And that was made known.

14 THE COURT: And as you already explained,  
15 that information you relied on would be  
16 included in the reports; but information you  
17 chose not to rely on would not be included?

18 THE WITNESS: That's correct, yes --  
19 transient.

20 THE COURT: Well, is that what "transient"  
21 means? I'm lost.

22 THE WITNESS: "Transient" just means  
23 information's being shared in emails. The  
24 information that is gleaned from the emails  
25 that's relevant to my report is taken. But the

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1 emails don't serve as the record of my work;  
2 right?

3 THE COURT: Well, I don't know.

4 THE WITNESS: The report --

5 THE COURT: In examining you as a witness,  
6 I would want to know what you relied on, but I  
7 would also want to know what you chose not to  
8 rely on. That would be important to me as  
9 someone examining you.

10 And I'm not suggesting, by the way, that  
11 emails like this are necessarily turned over in  
12 civil or criminal discovery. That's a  
13 different conversation. But it matters to me  
14 whether this was discussed with the prosecution  
15 or Mr. Commisso.

16 And my understanding is your answer to  
17 that is "yes."

18 THE WITNESS: Yes. For the record, yes.  
19 I'm aware that there's emails in our possession  
20 that were with Commisso that discussed these;  
21 right? And these all contained, for the most  
22 part, conversations with Attorney Commisso,  
23 until we were engaged later on in 2019 by the  
24 U.S. Attorney's Office. And this one appears  
25 to be with the U.S. Attorney's Office. Yep.

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1 THE COURT: I'm sorry to interrupt.

2 MS. BROWN: Mr. Naviloff, your voice is  
3 dropping a little bit.

4 THE WITNESS: My mic falls down, and I  
5 apologize. I wish there was a way to control  
6 the volume on my mic.

7 Q. (By Ms. Brown) I really do not want to belabor  
8 this, but I just want to follow up quickly on  
9 the Judge's point.

10 You agree with me that relying on  
11 something is different than reviewing  
12 something; right?

13 A. Relying and reviewing, yes, are different.

14 Q. And you agree with me that at least what the  
15 defense attorney was asking for here -- and I'm  
16 not going to get into whether he got it or not.

17 He was asking for documents reviewed, not  
18 just documents relied on. You knew that;  
19 right?

20 A. That's correct. That was part of the  
21 discussion with the U.S. Attorney's Office and  
22 with Commisso Law.

23 Q. And so you knew that's what the attorney was  
24 getting at -- was getting at documents  
25 reviewed, not just relied on?

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1 A. Yes.

2 Q. And you talked about -- there were discussions  
3 about whether turning over the emails, but  
4 before that you talked about, well, there's  
5 really super confidential things about business  
6 records.

7 That's separate than emails regarding your  
8 opinions from trial; right? You know, if  
9 there's some internal documents regarding  
10 security, you can't lump that into the same  
11 discovery request as emails sharing information  
12 among experts.

13 A. Are we talking about A2 here? Or are we  
14 speaking just generally to --

15 Q. Well, I think when I first asked you about A2,  
16 you said, "Well, we can't just give them  
17 everything, because that could involve internal  
18 business records." But I'm not asking about  
19 that right now.

20 I'm asking about these emails between your  
21 team at RSM, either internal at RSM or between  
22 Attorney Commisso. Those were documents that  
23 weren't turned over too; right?

24 A. So A2 says "a copy of all documents and data  
25 collected and reviewed," right, in calculating.

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1           So the documents and data collected --  
2           that would be information from United Way;  
3           right?

4   Q.   Yes.

5   A.   So the emails are part of my work and my team's  
6       work.  So with respect to this whole discussion  
7       on emails, I don't know how it fits into A2  
8       with respect to what my team and I are  
9       discussing in terms of analyzing and preparing  
10      a report that served as the final record on my  
11      opinion.

12           THE COURT:  What I want to know is, if it  
13      didn't have anything to do with this, why were  
14      you talking about it to the U.S. Attorney and  
15      Mr. Commisso?

16           THE WITNESS:  Just generally speaking,  
17      whether or not the emails were part of what  
18      should be shared; right?  We wanted to be  
19      overly broad throughout this process.  We had  
20      discussed just generally what we should be  
21      responding.  We understood that generally,  
22      emails are off-limits.  And my understanding  
23      was that was in agreement; right -- that what  
24      was in our emails, like I said, is not -- it  
25      was just transient in terms of a discussion



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1           that I may have had with my team or a question  
2           I may have had with my team. It didn't  
3           represent a final opinion on any matter.

4           THE COURT: All right.

5       Q.    (By Ms. Brown) You agree with me that an email  
6           is a document; right?

7       A.    An email is a document.

8       Q.    If I made a request for documents, emails would  
9           be included in that definition of documents?

10      A.    Yeah.

11           This says "collected and reviewed"; right?  
12           So it wasn't something that I collected --  
13           those emails. Those were conversations  
14           internally, the way I read this.

15           But I'm happy to -- I get the larger  
16           context here with respect to the emails and  
17           issues. And as far as RSM is concerned, we  
18           went above and beyond to produce everything  
19           that we could produce in terms of emails, even  
20           beyond what may have been part of the Judge's  
21           order.

22           THE COURT: Yeah, but understand  
23           something, Mr. Naviloff. This is a hearing  
24           about pretrial.

25           THE WITNESS: Yes.

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1 THE COURT: And I think -- did you just  
2 say -- maybe I misheard you. I thought you  
3 just said you thought there was an agreement  
4 that emails were off-limits.

5 THE WITNESS: I said my understanding is  
6 that, from emails we weren't producing, that  
7 RSM was not producing them in terms of -- this  
8 wasn't an area that was responsive to A2.

9 THE COURT: That's fair. Okay.

10 THE WITNESS: That's all. That's it. I  
11 didn't think it was responsive to A2.

12 THE COURT: What was the basis for that  
13 understanding that RSM would not produce  
14 emails?

15 THE WITNESS: Just a general discussion in  
16 terms of "what is meant here? Is this intended  
17 to be an overly broad" -- just this discussion  
18 we're having here; right?

19 Is this really intended to be some really  
20 tight discussion, or something overly broad?  
21 My fuzzy recollection is this probably came up  
22 for discussion with you, Judge Laplante.

23 THE COURT: I think you're probably right.

24 THE WITNESS: This came to a head  
25 somewhere in this process. And I don't recall

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1 what happened, but as part of this process,  
2 there were directions that were given to RSM  
3 that we followed.

4 THE COURT: Okay. So you just said,  
5 though -- I asked what the basis for your  
6 understanding was that emails would not be  
7 produced in response to this, which I  
8 understand.

9 THE WITNESS: Yeah.

10 THE COURT: I don't even think that's an  
11 unreasonable interpretation at all, by the way.  
12 But you said it was based on general  
13 discussions.

14 General discussions between who?

15 THE WITNESS: With the U.S. Attorney's  
16 Office. And I'm -- presumably, Commisso was a  
17 part of those discussions, because he was in  
18 most discussions that we had with the U.S.  
19 Attorney's Office, just generally speaking.

20 THE COURT: Thank you.

21 Q. (By Ms. Brown) So if I use this word  
22 "transient" a lot -- and as I understood your  
23 use of it, it explained a sort of work in  
24 progress as to your opinions, findings, and  
25 analysis in this case.

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1           Would that be a fair characterization of  
2           that?

3       A.    Correct.  Yes.

4       Q.    So the next paragraph would be A3.

5           Attorney Harrington asks for an explanation of  
6           the methodology used by RSM in calculating  
7           United Way's loss.

8           So I understand that, looking at the  
9           methodology, you didn't feel that these emails  
10          that we've just looked at already that talk  
11          about the calculations and collecting the data  
12          -- you did not feel that was responsive to  
13          number three?

14       A.   It looks like A3, to me, says, "Please write an  
15          explanation of the methodology used by RSM to  
16          calculate its loss."  And this is July of 2019.

17          The reports that were made available would  
18          have had the calculations with prior losses.  
19          But I don't recall us writing down, at this  
20          point in time, what my revised opinion or  
21          report would be, given that I was just  
22          retained.

23       Q.    So let's go down to 4 -- I think it's F --  
24          small F.

25          And one of the other requests is "witness

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1 interviews"; do you remember that?

2 A. Correct. Yes.

3 Q. And my understanding is RSM's response to that  
4 is "we don't write stuff down" kind of thing?

5 A. If notes are taken, they were typically on  
6 notepads for which relevant information made  
7 their way into those fact-finding reports that  
8 we had issued or shared -- or information that  
9 we had shared with counsel.

10 But there was no formal memos -- or at  
11 least my understanding from the team was that  
12 they weren't asked to, nor did they keep, memos  
13 in our record of retention, which is our shared  
14 folder.

15 MS. BROWN: Now I'm going to move to  
16 Exhibit E. And this is -- I'm going to go to  
17 the last page of Exhibit E, which is also -- I  
18 have as document 164-12. There we go.

19 (Pre-marked Defendant's Exhibit E  
20 introduced.)

21 Q. (By Ms. Brown) So this is an email that I  
22 believe you sent out. And it's kind of hard to  
23 see because of the -- I think these are  
24 hyperlinks here to other files, so they're not  
25 in the same -- but you send, and I've counted,

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1 15 files to Attorney Commisso. And if we can  
2 pull up that section on the top half there to  
3 look at the files that you sent to  
4 Attorney Commisso on Exhibit E so we -- we  
5 can't see the dates very well, but we can see  
6 the titles.

7 And four of these files have check marks  
8 on them; correct?

9 A. Correct.

10 Q. And the four that have check marks -- one's  
11 called "accounting exports;" right?

12 A. Correct.

13 Q. One is called "financial statements."

14 A. Correct.

15 Q. One is called "policies and procedures."

16 A. Correct.

17 Q. And one is called "bank statements."

18 A. Correct.

19 Q. At the bottom here of those 15 documents,  
20 they're labeled "redacted data security."

21 And under "redacted data security," one  
22 says "office phone invoices."

23 A. Correct.

24 Q. So did you make a determination that phone  
25 invoices were protected by data security?

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1 A. If I'm interpreting this, I'm going to  
2 interpret that there was something under  
3 "redacted" -- the security -- some description  
4 under folder 11 that's been removed --

5 Q. Oh. Okay.

6 A. -- by counsel. That's my guess.

7 Q. I understand.

8 So it's not that everything below that is  
9 redacted under data security; it's that there's  
10 a -- file 11 is --

11 A. Yes. That would be my best guess.

12 Q. And then there was a separate file where you  
13 kept things involving the insurance claim?

14 A. Correct.

15 MS. BROWN: So, Tracy, if we can go back  
16 to the previous page on this.

17 Q. (By Ms. Brown) And you are addressing an email  
18 to John after you're sending these attached  
19 links to these files.

20 "Let's discuss contents of these four  
21 folders for potentially providing to the U.S.  
22 Attorney's Office." And we're assuming, from  
23 what we just discussed, the four that had the  
24 check marks on them; correct?

25 A. That would be my best guess, yes. My

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1 recollection -- best recollection, I should  
2 say.

3 Q. Now, one of the questions I have about this  
4 email that hasn't been clear to me --

5 A. Yes.

6 Q. -- is do you have your own access to some of  
7 these files? Or do you have to, like -- do you  
8 have to go through Attorney Commisso to get  
9 documents? Or do you have access to documents  
10 all on your own? This seems to suggest that  
11 you have access to documents on your own  
12 without going through Attorney Commisso.

13 A. That's correct. So these are broad-based  
14 categories -- those folders -- of types of  
15 documents that my team collected and then put  
16 into categorical folders during the work that  
17 was performed -- the investigational work. So  
18 those would have been collected by us. And  
19 those folders would be appearing on our kind of  
20 system of record -- our shared server file.

21 Q. And this may sound like a dumb question, but it  
22 seems that if you're able to send them to  
23 Attorney Commisso, that you had access to all  
24 of those files listed there; right?

25 A. Yes.



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1 Q. And would you agree with me that all of those  
2 files that are listed in this email, Exhibit E,  
3 were not provided to the Defense; correct?

4 A. Can you share the next screen or the --

5 Q. Page two again?

6 A. Yeah, thank you. Sorry.

7 Q. That's okay.

8 And do you want to pull it out just so you  
9 can see what's --

10 A. A little bit bigger, yeah. That would be  
11 great.

12 So the question is whether the four check  
13 boxes were shared, or whether --

14 Q. So we're seeing -- of these files we see here,  
15 was everything shared with the Defense?

16 A. I'm guessing no, but I don't recall all the  
17 details; right? So what I do know is we went  
18 through the folders, and some of these -- many  
19 of these inside vendor phone invoices -- that  
20 stuff was all shared.

21 So anything that was relevant to our  
22 calculation was shared. There were some of  
23 these folders -- and I think there was the four  
24 here -- that related more broadly to financial  
25 statement information or accounting ledger

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1 detailed activity, or detailed policies and  
2 procedures that were either collected for us to  
3 assess the internal controls or to perform  
4 testing that was outside of the loss  
5 calculation.

6 So those were brought into a discussion  
7 with Attorney Commisso with respect to what  
8 information could be shared in terms of  
9 discussions then with the U.S. Attorney's  
10 Office, which I assume proceeded next in terms  
11 of what we had in terms that was relevant to  
12 the loss calculation.

13 Q. And one of the advantages of you being in  
14 control of what gets sent to the U.S.  
15 Attorney's is you know what you might be facing  
16 for cross-examination; correct?

17 A. We looked at this as many work streams.  
18 Anything related to the loss calculation that  
19 was in these files was shared out of an  
20 abundance of caution. There was no discretion  
21 here.

22 It was really -- the discretion leaned on,  
23 "Should we share stuff that had absolutely  
24 nothing to do with the loss calculation that  
25 may have been collected?"

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1 MS. BROWN: Can we pull up Exhibit Y?

2 And can we go to page -- is there a page  
3 three? Go back a bit. Okay.

4 (Pre-marked Defendant's Exhibit Y  
5 introduced.)

6 Q. (By Ms. Brown) So this starts off -- there's  
7 an email from Ryan that he'll, quote, "Draw  
8 something up, but on a high level. It's really  
9 just initial follow-up on opening document  
10 requests." So go back a page on this in terms  
11 of to the end of the document. Okay. Well,  
12 this starts out from Chris to Ryan and Ron.

13 "Do you have any issue with doing  
14 John Meyer's meeting on Wednesday by phone? It  
15 could be Webex." And then the discussion  
16 ensues regarding that. So let's go back to  
17 page three of that document. And it appears  
18 some sort of document is sent to Ryan, and he  
19 says he's going to draw something up.

20 Do you remember what that was about?

21 A. "I'll draw something up. Meeting to discuss IT  
22 questions." I think they were discussing --  
23 I'm not on this, but they may have circulated a  
24 list with respect to some question, maybe. I'm  
25 just guessing.

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1 "I'll draw up something."

2 Q. If we go up to the email after that, which  
3 appears to be from Chris Fitzgerald, he thanks  
4 Ryan for the work he's done on this particular  
5 project.

6 And then there's a note addressed to Ron,  
7 and it says, "Ryan analyzed the one instance we  
8 currently have where we have an Insight invoice  
9 and a DigitalNet invoice for the same period.  
10 We currently have two Insight invoices, a topic  
11 for discussion."

12 So at least according to Chris,  
13 Ryan Gilpin did analysis on this case; right?

14 A. So, yeah, Ryan's -- I'm happy to fill in the  
15 details there, at least what I know of the  
16 process here.

17 Ryan was receiving and inventorying the  
18 invoices for DigitalNet, and putting them into  
19 spreadsheets, and taking the line item detail  
20 from the DigitalNet invoices and putting them  
21 categorically into the types of goods -- the  
22 services and the equipment for purposes of us  
23 quantifying the analysis -- the loss  
24 calculation.

25 So he did some of the initial input. That

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1 information was then reviewed by others on the  
2 team, including myself as part of my quality  
3 control, and served as part of the fundamental  
4 quantification of the various amounts that were  
5 charged by DigitalNet.

6 So this is early on in the process -- July  
7 of 2018 -- and he was collecting DigitalNet  
8 invoices. And he had identified DigitalNet  
9 invoices and was quantifying amounts --  
10 itemized amounts on those invoices.

11 Q. And this was for calculating potential loss  
12 regarding duplicative billing; is that what the  
13 purpose of doing that analysis was?

14 A. Let's see. Currently, Insight and -- same  
15 period. So I would presume, if this is  
16 Insight -- I'm just thinking. Bear with me.

17 Yeah, so my recollection was Insight was  
18 billing United Way directly. And then we saw  
19 DigitalNet also billing United Way. So -- for  
20 the same infrastructure-related services. So  
21 that's the -- under the managed IT agreement.

22 Q. And so what we were just talking about -- that,  
23 you would agree, would involve some at least  
24 basic -- or some knowledge of IT services.

25 Because if you're looking at two documents

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1 and saying that they're delivering the same  
2 thing, you would need to know about what  
3 they're allegedly delivering; right?

4 A. Yes, there's some basic level of understanding  
5 of IT services. None of this was complex. It  
6 came down to some acronyms and some jargon  
7 being included, and some marketing literature  
8 being included on some of the invoices. So  
9 understanding what that jargon or marketing  
10 literature meant in terms of aligning -- in  
11 other instances, that we were verbatim. So  
12 there was no real judgment.

13 But here's where Ryan was helping to show  
14 us where there was either marketing terms or  
15 jargon used in the invoices, and making sure it  
16 went into the proper category of services that  
17 was being delivered.

18 Q. And so you were relying on Ryan to interpret  
19 the IT language and services to make this  
20 analysis; correct?

21 A. He was doing a first pass, is the way I would  
22 describe it.

23 Q. But he was doing a first pass as someone who  
24 was a couple of years out of college; right?

25 A. Correct. This is a rather straightforward

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1 infrastructure hosting that we had --  
2 agreement. You've got services being charged  
3 under agreement.

4 Does the invoice agree with the contract  
5 for which the services were being delivered;  
6 right? Those kind of things that I would  
7 expect any first- or second-year to be able to  
8 perform.

9 Q. And that was the opinion that you gave at  
10 trial; correct -- that these were  
11 straightforward. You just had to compare  
12 invoice to invoice, and anybody could do it;  
13 right?

14 A. Well, there's obviously words that are being  
15 used in these invoices that require further  
16 research. And that was where some of the  
17 background from both Diego as well as from Ryan  
18 was useful.

19 But, yeah, overall, the analysis of  
20 understanding the -- breaking down the invoices  
21 from DigitalNet where there was detail -- I  
22 mean, it was difficult in the fact that in many  
23 of the line items on the DigitalNet invoices,  
24 there wasn't sufficient detail. But where  
25 there was sufficient detail categorizing them,

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1 particularly consistent with the hosting  
2 services -- infrastructure hosting -- as well  
3 as the desktop as a service -- those were two  
4 core areas that were more straightforward.

5 Q. So my question was that -- this was an opinion  
6 you gave at trial, which was this was very  
7 straightforward. Maybe had to do a little  
8 looking stuff up, but that this was  
9 straightforward and you did not need IT  
10 expertise to make this analysis.

11 That was your opinion at trial; correct?

12 A. If you share it with me, then -- I don't know  
13 if I said those words directly or not, but...

14 Q. Okay. Did you say you didn't need IT expertise  
15 at trial, or -- I mean, I'm trying to --

16 A. No, I shared with you my -- what I testified to  
17 here today; right -- is that Ryan assisted  
18 looking at DigitalNet invoices, summarizing  
19 them, and categorizing them for further review  
20 by myself and my team.

21 Q. And you're saying that his two or three years'  
22 experience was sufficient to make the technical  
23 analysis that was necessary?

24 MR. DAVIS: Objection. Asked and  
25 answered. Waste of time.



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1 THE CLERK: You're on mute, Judge.

2 THE COURT: I'm sorry about that.

3 I'm going to overrule the objection, but  
4 he is correct. We are rehashing here, so let's  
5 not do that.

6 Q. (By Ms. Brown) Okay.

7 On Ryan Gilpin, as I understood your  
8 answer, you were saying that you thought the  
9 experience level that he had was sufficient to  
10 the task that you had given him to make the  
11 analysis of these invoices for duplicative  
12 billing; does that summarize it?

13 A. Yes, that's correct. And as part of this  
14 analysis, we also looked at the other ad hoc  
15 stuff that wasn't being included or bucketized  
16 with respect to these same services. So some  
17 of the initial hardware setup. So looking at  
18 the totality of the services being provided,  
19 and carving out the reoccurring charges; right?

20 So it was an effort to create an  
21 apples-to-apples comparison of where those  
22 reoccurring charges existed for which they were  
23 significantly inflated, as I reported in my  
24 expert testimony.

25 Q. And you've sat in at trial for the testimony of

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1 the defense expert, Jason Sgro; correct?

2 A. Yes.

3 Q. And you knew he disagreed with that opinion?

4 A. He did, yes.

5 Q. He disagreed that you could make the findings  
6 that you made based on your experience and the  
7 data that you had available to you; that was  
8 his opinion?

9 A. That's generally my recollection, yes. His  
10 view was that it's hard to make  
11 apples-to-apples here. And for the reasons  
12 that I described earlier; right -- that there's  
13 initial setup costs and other costs that come  
14 into play here -- and I think he viewed that as  
15 being too difficult of an exercise, perhaps,  
16 for purposes of doing this analysis.

17 Q. Now, one of the other areas that was asked for  
18 by the Defense was information regarding market  
19 data. That was in that email that we talked  
20 about before.

21 Do you remember that -- that there was a  
22 request for market data?

23 A. I don't recall, sorry.

24 MS. BROWN: Well, actually if we could  
25 pull up --

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1 THE COURT: Is there any dispute that he  
2 requested market data? It's not disputed;  
3 right? We don't need to pull up the doc to do  
4 that.

5 MS. BROWN: Okay. Great. I thought it  
6 was in there. So I want to talk about that.

7 And if I could pull up Exhibit Z, which is  
8 that RSM report, again. We're going to page  
9 six of the RSM report of Exhibit Z.

10 Q. (By Ms. Brown) So this slide that -- for the  
11 internal use for United Way talks about loss  
12 quantification.

13 That's the title up on the bar; correct?

14 A. Correct. Yes.

15 Q. And so there's four bullets here. And I'm only  
16 going to ask you about one, and that's the last  
17 one.

18 And it says "Analysis of market data."

19 And you, in this presentation to the  
20 United Way, said, "We identified IT vendors,  
21 including national third-party application  
22 development firm Andar and TBS Networks, to  
23 establish" -- "to comparative quote amounts for  
24 services reportedly delivered by DigitalNet to  
25 United Way, and B, to order, to access, and

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1 quantify potential excessive billings."

2 So in your reporting back to United Way,  
3 one of the things that you're looking at in  
4 terms of potential issues is the analysis of  
5 market data; correct?

6 A. This market analysis looks like it's particular  
7 or pertaining to website development. Andar  
8 and TBS Network weighed in on a website  
9 development cost, I believe.

10 Q. And did you say that you remember that there  
11 was a discovery request? And I'll just say  
12 it's at Aa, on October 11, where  
13 Attorney Harrington specifically asked for  
14 market data.

15 Do you not recall that now, or...

16 A. Yeah, I believe you. I have no reason to doubt  
17 that.

18 Q. In fact, he specifically referenced Andar and  
19 TBS, which would tend to suggest that maybe he  
20 was getting it right off of this very document;  
21 right?

22 MR. DAVIS: Objection. Calls for  
23 speculation.

24 THE COURT: No, it doesn't.

25 Q. (By Ms. Brown) But he did ask for -- he

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1 specifically referenced --

2 THE COURT: Hold on. Let me say this.

3 I overruled the objection, but I think I  
4 do understand the sense of the objection, which  
5 is that this is almost like a deposition now;  
6 okay? And I realize that you've got a burden  
7 here, but, I mean, it isn't really about --  
8 there's no discovery order violation or rule  
9 violation. Unless this market data-allotted  
10 question you're going to leads to something  
11 exculpatory, there's no reason to inquire about  
12 it. Because the issue isn't that the discovery  
13 requests were not complied with. The issue is  
14 whether exculpatory evidence was not provided.

15 So connecting up to requests doesn't  
16 really get us anywhere here. Unless -- and  
17 maybe you are -- unless you're going to  
18 something exculpatory.

19 MS. BROWN: Yes, Your Honor. And that's  
20 where I'm going. So of the posttrial  
21 discovery, this witness made representations  
22 about market data not being relevant and not  
23 turning it over.

24 THE COURT: Okay.

25 MS. BROWN: So I know this is somewhat

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1 laborious, but in order for that to make any  
2 sense, I needed to go through the fact that it  
3 was part of his calculation. There was a  
4 request for it. And then the fact that he  
5 chose not to turn over that information, I  
6 think, is relevant.

7 THE COURT: Not unless it's exculpatory.  
8 Because the issue isn't whether they complied,  
9 again, with a discovery request or discovery  
10 order. The issue isn't really the prosecutors  
11 here were on notice of exculpatory information,  
12 or whether it should have been provided to them  
13 both, right, but whether there's exculpatory  
14 information that was not provided pursuant to  
15 their constitutional obligation.

16 So I don't think you have to lay this  
17 ten-question foundation. I think you can raise  
18 the evidence, establish for me whether it's  
19 exculpatory or not in the best way you can, and  
20 then you can tag it back to whether -- to show  
21 me how either the prosecution knew about it or  
22 should have known about it.

23 But we're spending a lot of time here.  
24 And you're trying to lay it out, but I'm not  
25 sure it's necessary. And you've got a fairly

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1       -- I don't want to call the witness  
2       "uncooperative," but he's an adverse witness.  
3       So as you go through it, it's laborious,  
4       because he doesn't want to be led in a  
5       direction he doesn't want to go, like any  
6       witness.

7               So I would suggest you point to me the  
8       exculpatory evidence. And if I think you need  
9       to -- if I have questions about whether it  
10      should have been provided for some reason, I'll  
11      ask. But, I mean, a perfect example is those  
12      emails; right?

13             Those types of emails, internally by an  
14      expert, wouldn't normally be shared in civil  
15      discovery. That normally would not happen,  
16      unless there was a request for it and it was  
17      sort of worked out; right? However, if the  
18      prosecution is aware of it and either didn't  
19      get it, or got it and didn't review it, or  
20      reviewed it and didn't turn it over, well,  
21      that's a different analysis.

22             It's not about whether market data was  
23      necessarily requested. It's about whether  
24      exculpatory market data information was not  
25      provided.

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1 MS. BROWN: Well, just briefly -- I know  
2 we're coming up to 12:30, Your Honor.

3 One of the cases that we are looking  
4 towards in this case is the Bundy case that's  
5 cited in our pleadings. And the Court -- and  
6 so one of the issues in Bundy was whether he  
7 could get a new trial or it should be  
8 dismissed. And the Court spent a lot of time  
9 talking about the fact that these items not  
10 only were requested, and specifically  
11 requested, and specifically requested for a  
12 reason, but that then that puts the Government  
13 on notice.

14 Like, "Oh, that's their defense. That's  
15 where they're going. They're going with that  
16 defense, so if we find anything that goes along  
17 with that, as opposed to not supporting  
18 that..."

19 So the fact that the Government was put on  
20 notice about "here's what the defense was."  
21 The Defendant's expert was repeatedly trying to  
22 get to the basis of these opinions because he  
23 thought that they were problematic and they  
24 didn't have a sufficient basis.

25 And that's the other -- this goes back to



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1 before -- why we decided not to call  
2 Attorney Commisso first. Because this is -- we  
3 need to set this foundation.

4 But the -- most important goes to our  
5 expert, who is going to explain, like, "Hey,  
6 this would have helped me explain what I was  
7 trying to explain, which is" --

8 THE COURT: So what evidence are you  
9 talking about? Just tell me.

10 MS. BROWN: Okay.

11 Well, one of the things is they're talking  
12 about market data here, and making these  
13 comparisons with Andar and other things. And  
14 so I want to establish that, especially the  
15 previous email regarding having Ryan look at  
16 comparing the invoices -- those are really  
17 important to our expert, because it shows that  
18 he can see how they made the mistakes.

19 Like, he knew at trial that these opinions  
20 were not correct. And so now that he can see  
21 these emails, he can see why. He can see that  
22 this young associate --

23 THE COURT: So what evidence are we  
24 talking about? What exhibits? What evidence?

25 MS. BROWN: Well, for example, like we

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1 were just talking about a few minutes ago about  
2 looking at invoices and looking at terms, and  
3 matching up the terms and saying, "Well, this  
4 has the same terms, and this has the same  
5 terms. So, therefore, it must be duplicative."

6 Or saying, "DigitalNet provided this, and  
7 something else provided that, so then it's  
8 duplicative." But DigitalNet may have added  
9 value to the same thing that's not showing up.

10 THE COURT: Sure. But you're not hearing  
11 me, I guess. We're talking past each other.

12 What have you been given in the posttrial  
13 discovery that should have been produced? What  
14 are you actually talking about? That's all I'm  
15 asking.

16 MS. BROWN: Okay. So these emails show  
17 that --

18 THE COURT: So it's in the emails?

19 MS. BROWN: It is in the emails, yes.

20 THE COURT: The point isn't that the raw  
21 data wasn't provided; the point is that it was  
22 a point of discussion in the emails?

23 MS. BROWN: Right. And the emails show  
24 errors in their analysis that our expert can  
25 now point to that he couldn't do before trial.

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1           THE COURT: That's what I wanted to know.  
2 Thank you.

3           I don't know how much time you really need  
4 to spend laying foundation. I think the better  
5 way to do this -- and that's why you're drawing  
6 these objections, is it's just taking a long  
7 time -- is maybe just make an offer of proof  
8 that --

9           "Look, this was requested and not  
10 produced. It was requested by this exhibit and  
11 not produced." And if Mr. Davis disagrees,  
12 he'll dispute it and you can develop it with  
13 the witness. But I think a lot of time you're  
14 spending is laborious because the witness is an  
15 adverse witness who -- I don't want to call it  
16 pulling teeth, but it's slow going. And he's  
17 doing his best. He's doing his best, but  
18 there's a -- you know, it's an adverse witness.

19           So I would suggest after lunch, when you  
20 want a big lead-up before you land the blow,  
21 just make an offer of proof about, like, the  
22 travel of the case; right? There was this  
23 letter. And it was requested, and there was  
24 discussion, and we have the exhibit.

25           That's what I would suggest. I'm going to

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1 let you do it as you want, by the way, but it's  
2 just a suggestion because we are -- we've spent  
3 half a day now, and we're partway through the  
4 direct of one witness. And it's -- I mean, the  
5 case took how long to try? It took -- I don't  
6 remember.

7 What did it take? Anybody remember?  
8 Seven days, Kim? Yeah. Anyways, thanks. I  
9 will see you at 1:30.

10 (Recess taken at 12:32 p.m., and the  
11 proceedings resumed at 1:42 p.m.)

12 THE COURT: Okay. Ready to resume.

13 Anybody have anything we need to raise  
14 before we continue?

15 MS. BROWN: Not from the Defense, Your  
16 Honor.

17 THE COURT: Attorney Brown, please  
18 proceed.

19 MS. BROWN: And just by way of an offer of  
20 proof, prior to the break we established that  
21 in the report to United Way, RSM made reference  
22 to market data that they had relied on, and  
23 that the Defense had made a specific request  
24 for market data and also for witness interviews  
25 in that same July 2019 request, which we had

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1 talked about before. So I'll go to the next  
2 step on that.

3 If we can pull up Exhibit Cc, Tracy.  
4 (Pre-marked Defendant's Exhibit Cc  
5 introduced.)

6 THE COURT: Mr. Davis, while we're pulling  
7 that exhibit up, I probably don't need to say  
8 this, but if you hear anything in an offer of  
9 proof by defense counsel with which you don't  
10 agree, please just make your objection known.

11 MR. DAVIS: Will do, Judge.

12 Q. (By Ms. Brown) And I'll find where --  
13 Mr. Naviloff -- there you are.

14 So this document that we are looking at,  
15 which is Exhibit Cc, is an email from  
16 Ryan Gilpin to -- we'll refer to it as several  
17 members of the team, including yourself,  
18 Mr. Nahass, Diego Rosenfeld, Trikinowsky  
19 (phonetic). And it speaks for itself, so I  
20 won't read everybody's name on there.

21 So this is dated August 20, 2018. And a  
22 couple things I want to ask you about on this  
23 email -- and we'll pull out the first paragraph  
24 first, just to kind of set what it's about.

25 And so this is from Ryan saying that he

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1 wanted to send out a recap after a call with --  
2 I would pronounce that Riyal Banarg (phonetic)  
3 -- from Andar "just to summarize what we  
4 identified and what our next steps are with him  
5 to tie up -- tie out support on the DigitalNet  
6 web development cost." So that's sort of the  
7 topic.

8 So part of this email is he's discussing a  
9 conversation he had with someone from Andar;  
10 correct?

11 A. Correct. Yes.

12 MS. BROWN: And just for the Court's  
13 benefit, this is an email that was not produced  
14 prior to trial, but was recently produced in  
15 the -- we've heard reference to the 600-plus  
16 emails. This was part of that.

17 So, Tracy, if we can go to the next  
18 paragraph in the same email, Cc.

19 So Mr. Gilpin goes on to summarize his  
20 conversation with Riyal Banarg, and it said  
21 that he reviewed pages identified in  
22 DigitalNet's \$200,000 web development invoice.

23 He estimated an approximate level of  
24 effort of four hours per page "should they have  
25 been developed individually and in a vacuum, so

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1 we can likely estimate a lower range of time  
2 for subsequent pages developed after the  
3 first." And then he provides an hourly rate.

4 So would it be fair to say that this email  
5 is a summary of a witness interview?

6 A. It appears to be so, yes.

7 Q. And you knew that Attorney Harrington was  
8 looking for summaries of witness interviews,  
9 didn't you?

10 A. Yes.

11 MR. DAVIS: Objection. Relevance. Waste  
12 of time.

13 Your Honor, the web development costs were  
14 specifically excluded from Mr. Naviloff's loss  
15 calculation, as I understand it. So this has  
16 nothing to do with his loss calculation.

17 THE COURT: Well, is it -- okay. Yeah,  
18 market data was excluded from the loss  
19 calculation.

20 You're saying it has no relevance to his  
21 loss calculation; right?

22 MR. DAVIS: I'm saying that the cost of  
23 web development that Mr. Alrai billed for was  
24 specifically excluded from Mr. Naviloff's loss  
25 analysis.

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1 THE COURT: If that is true, Ms. Brown,  
2 does that affect your desire to inquire?

3 MS. BROWN: Well, Your Honor, I think that  
4 this is -- I do know that this witness -- and  
5 I'll make this by an offer of our proof -- does  
6 say that when he specifically asked for this  
7 data, he says he believes it's not relevant to  
8 his opinion.

9 We feel that it's relevant to the analysis  
10 that they've done in this case and the  
11 progression of their opinions. And,  
12 specifically, it was represented to us that  
13 they did not keep any sort of memorialization  
14 of witness interviews. And this appears to be  
15 that. So I don't intend to spend a lot of time  
16 on this, but I think this is relevant that --

17 THE COURT: Let me try.

18 MS. BROWN: -- he was in charge of witness  
19 interviews and memorialized them in email.

20 THE COURT: So it's -- but is it also --  
21 and I want to make sure I understood you.

22 Is it also going to be your -- are you  
23 proffering me your expert will also say that  
24 the failure to account for this factor in the  
25 loss calculation was in some way a flaw in



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1 Mr. Naviloff's analysis?

2 MS. BROWN: No, I do not believe our  
3 expert is going to say that.

4 THE COURT: It just goes to this witness  
5 interview thing?

6 MS. BROWN: I'm sorry, what?

7 THE COURT: It just goes to the witness  
8 interview issue, the representation, and,  
9 therefore, his credibility?

10 MS. BROWN: Exactly.

11 THE COURT: I'll allow it.

12 Q. (By Ms. Brown) So you would agree with me,  
13 Mr. Naviloff, that this -- Ryan Gilpin  
14 summarized a witness interview in this email;  
15 correct?

16 A. Yes.

17 Q. And I won't go into the details of the next  
18 paragraph, but if we can take down the pullout  
19 and go to the next paragraph, he actually  
20 interviewed another person and summarized that  
21 interview as well; correct?

22 A. Yes.

23 Q. And when you were asked for documents regarding  
24 market data, you said that it wasn't relevant  
25 to your opinion; correct?

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1 A. I was not aware of this email at the time. If  
2 I've identified a document that I thought was a  
3 summary of the nature of the discussions, I  
4 would have proffered it. I just wasn't aware  
5 of this. And I don't know that when I asked my  
6 team to pull interview notes that they were  
7 aware of this interview at the time of the  
8 request.

9 So this was one where this is not relevant  
10 to what I testified on, which may conflate the  
11 issue with my -- this document. But,  
12 ultimately, when you look at this, this only  
13 serves to increase the amount of loss that I  
14 would have shown in my calculation had I  
15 testified to this matter or this issue of these  
16 different services that were provided.

17 Q. But just to clarify, you are copied on this  
18 email; right?

19 A. I was. And, yeah, I have thousands upon  
20 thousands of emails. And it's not always easy  
21 to distinguish every single email; hence, why  
22 we try to memorialize stuff within our shared  
23 folders so that we can share them.

24 Q. If we can go on to Exhibit Y. And I'm trying  
25 to find where the quote -- oh, it's the first

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1 thing.

2 So the first full sentence after it says  
3 "Ryan" on the top -- can you pull that out,  
4 Tracy? Thank you. And this is an email by you  
5 to Ryan Gilpin.

6 It says, "You are central to the team.  
7 Having you on-site when possible is advisable.  
8 Thanks."

9 That is a statement you made about  
10 Ryan Gilpin; correct?

11 A. Correct.

12 Q. And you would agree that he was central to your  
13 team; correct?

14 A. Yes. He was one of several people that was in  
15 the field doing work helping with fact-finding.

16 (Pre-marked Defendant's Exhibit Dd  
17 introduced.)

18 Q. (By Ms. Brown) So I'd like to move to  
19 Exhibit Dd, which is also document 164-15:3.

20 So this email, which I think is a couple  
21 of pages long, sets forth a list of tasks for  
22 different people on the team. And right on the  
23 bottom of that page where I think it says --  
24 where there's, like, a partial box. And if we  
25 could pull out that section with the partial

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1 box. Yeah, that's it.

2 So this is a task for Ryan, which is to  
3 follow up with John Meyer re: the \$154,080  
4 category special projects hosting fee.

5 So that's a task that Ryan had -- to meet  
6 with John Meyer or talk with John Meyer and get  
7 that information?

8 A. That appears so, yes.

9 Q. And, again, you don't have any emails  
10 summarizing any conversations that Ryan Gilpin  
11 had with Mr. Meyer? Or you didn't produce any  
12 in discovery; correct?

13 A. I'm not aware. If I found something in the  
14 600-plus emails, I'm happy to see it.

15 Q. And on this particular email here, the one --  
16 Dd -- Diego Rosenfeld is not on the circle of  
17 people who are discussing these issues in terms  
18 of the tasks; correct?

19 MR. DAVIS: Same objection. Relevance.  
20 Waste of time. Special projects and hosting  
21 fee are, again, specifically excluded from  
22 Mr. Naviloff's expert report. Counsel is  
23 cross-examining on points which have no bearing  
24 on Mr. Naviloff's testimony. This is a waste  
25 of time.

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1 MS. BROWN: Your Honor, the main point of  
2 my cross-examination on this is the, to quote  
3 Mr. Naviloff, "central role" that Mr. Gilpin  
4 had in the collection of data, interviewing  
5 witnesses, and analysis of IT data. And this  
6 email shows that role, and the responsibilities  
7 and tasks that were given to this person that  
8 go to this witness' credibility. And that's  
9 why we've chosen this particular email which is  
10 cited in our motion.

11 THE COURT: But if it's data collection  
12 and involvement on issues that didn't go to the  
13 opinion, is it relevant?

14 MS. BROWN: I think that the fact that RSM  
15 delegated to a very inexperienced and, we would  
16 argue, unqualified associate to do the  
17 investigation in this case, and collect data,  
18 and analyze that data -- it's very relevant to  
19 the opinions. And that was a central theme the  
20 Defendant tried to establish at trial, but was  
21 unsuccessful because he didn't have these types  
22 of documents that show how central Ryan Gilpin  
23 was to the opinions that were offered at trial.

24 THE COURT: But how could it be central to  
25 the opinion if this wasn't included in the

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1 opinion? That's really what the objection is  
2 saying, and that's what I'm asking you.

3 I can understand the bigger picture -- I  
4 really do. But -- and also, well, yeah, I  
5 mean, they're not central to that opinion.  
6 That's the point. Unless you have an argument  
7 that they should be, and it doesn't sound like  
8 Mr. Sgro is going to say that.

9 So I've got to say, in the interest of  
10 some type of efficient proceeding, I've got to  
11 sustain. Let's stick with the offers of proof  
12 and let's get right down into the documents. I  
13 really don't think you'll get objections from  
14 the prosecution in most situations.

15 Q. (By Ms. Brown) Mr. Naviloff, do you remember  
16 at trial that you were asked about the fact  
17 that you were not an IT expert?

18 A. Yes, I do. I'm sorry.

19 Q. Okay. I didn't want to interrupt you.

20 And that when you were asked about that,  
21 you said that you had consulted with John Meyer  
22 and Diego Rosenfeld; correct?

23 A. That's correct, yes.

24 Q. And you didn't mention Ryan Gilpin, did you, by  
25 name?

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1 A. I'd have to go back to the transcripts. I know  
2 I mentioned in my report that it included  
3 others under his direction or other IT  
4 professionals, so...

5 Q. And when you were asked about your lack of IT  
6 experience, you stated that in speaking with  
7 John Meyer and Diego Rosenfeld, you explained  
8 that Diego Rosenfeld was a principal with over  
9 20 years of experience in technology solutions;  
10 do you remember that?

11 A. Yes. Correct.

12 MS. BROWN: Now I want to talk to you  
13 about an email -- it's documented 164-1. It's  
14 also exhibit Ff, if we could pull that up.  
15 This one's really hard to see, so I have a copy  
16 here that I'm going to look along with.

17 (Pre-marked Defendant's Exhibit Ff  
18 introduced.)

19 Q. (By Ms. Brown) So this is an email from  
20 Chris Fitzgerald to you. If we can pull up the  
21 first sentence, we can get an idea of what this  
22 email is about. So Mr. Fitzgerald was saying  
23 it would take nine hours over the course of a  
24 year to dip below 99.9 percent.

25 And it sounds like the two of you are

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1 talking about some sort of analysis of  
2 financial information you have regarding this  
3 case; correct?

4 A. Yeah, it looks like it's availability, right,  
5 and a high availability for the backups.

6 Q. And I'm going to skip down to the third  
7 paragraph of that first email there, right  
8 before Chris Fitzgerald's name, and pull that  
9 out.

10 And this email says that "on another note,  
11 I think we need to have a substantive meeting  
12 with Diego to get him in the loop. I'm a bit  
13 worried now, now that we are communicating with  
14 the U.S. Attorney's Office" -- or,  
15 "communicating to the U.S. Attorney's Office  
16 and relying solely on Ryan, who is only a  
17 (newly promoted) senior associate. In the  
18 event Diego needs to testify, we need to be  
19 sure he agrees with what we are relaying to  
20 counsel/USAO."

21 So the fact that Mr. Fitzgerald is saying  
22 "we need to have a substantive meeting with  
23 Diego to get him in the loop," one could infer  
24 from that he's not in the loop; would that be a  
25 fair inference?



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1 (Audio dropped.)

2 Q. (By Ms. Brown) Chris, part of your team, was a  
3 bit worried that now that you -- meaning you  
4 and RSM -- are communicating with USAO, that  
5 relying on Ryan, who is only a newly promoted  
6 senior associate -- that is something he stated  
7 to you; correct?

8 A. Yeah, that's here.

9 Q. I want to go to -- right after the second line,  
10 "USAO," is the word "relying."

11 That's a word your team member used as to  
12 Ryan Gilpin -- you said the word "relying" on  
13 him; right?

14 A. So this is a good question; right? So this  
15 email goes to the center of what we're  
16 preparing and who's going to present evidence  
17 with respect to the backup; right --  
18 high-availability backup. Certainly, I can  
19 look at, and I saw, the report that inventoried  
20 what was backed up at a point in time.

21 I'm not an IT expert and wouldn't testify  
22 in this. For purposes of my loss calculation  
23 done earlier, there was a preponderance of  
24 evidence collected throughout the investigation  
25 which concluded other IT professionals.

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1           So when we're looking at the totality of  
2 evidence when I was preparing my report,  
3 John Meyer -- certainly, along with my team, I  
4 had the utmost confidence, and continue to have  
5 the utmost confidence, that they got the right  
6 answer.

7           What the concern appears to be here -- and  
8 this is Chris' concern -- is that we're going  
9 to be asked to testify, or I would have been  
10 asked to testify on something as technical as  
11 what constitutes high availability. And you  
12 can see us breaking down the numbers here. I  
13 wouldn't know an industry -- whether it's  
14 measured over a year, or two years, or how that  
15 would work in terms of the standards as well as  
16 testifying on this.

17           But from what I deduce from this whole  
18 conversation is, Look, you've got a couple of  
19 images. What's contractually obligated or  
20 promised was to have real time parallel system.  
21 So I'm not testifying on that. Chris knows I'm  
22 not testifying on that. And he knows Ryan's  
23 not testifying on that. That's not something  
24 he's going to testify on. He's not a seasoned  
25 testifying expert.

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1           So to the extent that the U.S. Attorney's  
2           Office needs someone to testify, which,  
3           ultimately, John Meyer has, then that would  
4           have been a point of concern. And I think  
5           that's -- I'm inferring from this whole  
6           conversation that that was a concern.

7           Further, Diego and I had many  
8           conversations in the hallway. He sits down the  
9           hallway from me. And those conversations are  
10          outside the purview of Chris. So with respect  
11          to where Diego was or wasn't with respect to  
12          some of these issues, I think he was a little  
13          bit outside the loop as well.

14       Q.    I've got a couple questions to follow up on all  
15              that.

16       A.    Sure.

17       Q.    You said that you were lacking in certain areas  
18              of expertise, and I'm not sure if I understood  
19              what that was.

20           Was it solely as to the high-availability  
21           backup, or to other areas of IT? I'm not sure  
22           if I followed your answers.

23       A.    Yeah. What constitutes high-availability  
24              backup as an industry professional; right? I  
25              mean, there's contractual terms that said

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1 99.99, but I don't know that that had a  
2 one-year requirement. I don't know how that  
3 was measured over what period of time.

4 So some of those special technical items  
5 certainly aren't in an area that I would have  
6 expertise in. Chris knows that. As far as --  
7 I think there was an incident that immediately  
8 followed the transition of the IT department,  
9 where the organization did suffer downtime;  
10 right? And it was essentially on the same  
11 platform, is my understanding.

12 So all that stuff goes into areas that I  
13 wouldn't testify on, because why did the system  
14 go down? Whether or not that incident, which  
15 appeared to result through the lack of services  
16 that were promised, and how they contributed  
17 with -- separate and apart from what I was  
18 doing, which was an accounting analysis.

19 So Chris is right to have called out, from  
20 an accounting analysis, this isn't what we're  
21 -- or what I would testify on. That these are  
22 areas that get technical into whether or not  
23 the proper backups were occurring. I know we  
24 saw the images, and I saw evidence that it  
25 wasn't occurring. But with respect to the

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1 significance of all those events, and how they  
2 would translate into confirmation that  
3 high-availability backup didn't occur -- that's  
4 certainly an area that the U.S. Attorney's  
5 Office sought advice from John Meyer and  
6 others.

7 Q. So is it your testimony that the gap that you  
8 had in your expertise, which you admit has to  
9 do on this particular area -- high-availability  
10 backup -- that John Meyer filled that gap in  
11 terms of a witness?

12 A. Yeah, I believe I put an assumption in the  
13 report that -- there is an assumption that  
14 high-availability didn't occur, with John Meyer  
15 testifying to the fact. I'm pretty sure that's  
16 how I phrased it in my report, or something to  
17 that effect.

18 So to the extent that high-availability  
19 backup did occur, which doesn't seem like it  
20 did, according to either Ryan, to Diego, to  
21 John Meyer, that would be news to me. But for  
22 purposes of what I was being asked to testify  
23 on as an accounting analysis, I was relying  
24 upon their expertise with respect to what,  
25 technically, is high availability, and was

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1 having two copied servers that appeared to have  
2 been standalone and potentially not run in  
3 parallel -- once again, outside of my expertise  
4 whether or not that really satisfied the  
5 obligation under -- contractually.

6 Q. I'm just trying to follow you.

7 Are you saying that the opinion that you  
8 relied on regarding high-availability backup  
9 came from John Meyer, or Diego Rosenfeld, or  
10 both?

11 A. It's John Meyer, but it was -- his opinion was  
12 consistent with my team's view; right? And  
13 they weren't asked to offer an opinion to me or  
14 to anyone. They did fact-finding. They shared  
15 what they understood to be the evidence.  
16 John Meyer had the same evidence, and  
17 John Meyer testified, I believe.

18 Q. So if they already had evidence from John Meyer  
19 on this issue, and you weren't qualified, why  
20 would you need to bring Diego Rosenfeld into,  
21 quote, "the loop"?

22 A. Bringing Diego into the loop is what may have  
23 potentially -- this is predetermining who's  
24 testifying on what, if anything. So I didn't  
25 know whether or not we were going to do more

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1 work. And, potentially, Diego would have  
2 offered an opinion of his own, separate and  
3 apart from what I'm doing, whether Diego would  
4 potentially deliver an opinion that was  
5 supportive of John Meyer's opinion or separate  
6 entirely from what I was doing.

7 Q. And just to emphasize the date on this, it's  
8 November 28 of 2018, which is a significant  
9 date in this case because that was the date  
10 that Mr. Alrai was indicted; correct? Remember  
11 we talked about that in some earlier emails?

12 A. Yeah, I believe so. I don't know the exact  
13 date, but I know this is all happening around  
14 the same time. And there's a discussion of who  
15 would be testifying to what.

16 And I think that's part of what Chris is  
17 getting at here -- is that I've done an  
18 accounting analysis, and that the fundamental  
19 math behind that analysis is solid. The cost  
20 comparison is solid. What is absent is the  
21 delivery. Was it delivered or not? So this  
22 flips into simply whether it was delivered or  
23 not to whether it was overbilled.

24 So, in my opinion, even if it it was  
25 delivered, you fall back to my other

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1 calculation of \$3.7 million. There's no cost  
2 to support the level of billing for these  
3 services.

4 Q. So you will agree with me that this email shows  
5 that at least one member of your team is  
6 concerned about Ryan's lack of experience?

7 A. His specific concern is, he states here -- I  
8 mean, you can read it for yourself. But my  
9 understanding or what I infer from this is that  
10 we have to potentially provide evidence to the  
11 U.S. Attorney's Office, if asked. And that may  
12 include testifying.

13 And the understanding is that if we need  
14 to testify -- meaning people at RSM -- those  
15 identities of those individuals not known --  
16 then we would need more than just Ryan to  
17 testify with respect to what was, at a minimum,  
18 overbilling, but may extend to undelivered  
19 services.

20 Q. But it doesn't say you need more than Ryan.

21 It says you need to bring Diego into the  
22 loop instead of Ryan.

23 A. I don't want to mince words, but that would be  
24 more; right -- bringing another person? And  
25 this is also -- as I mentioned, this is



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1 Chris Fitzgerald's perspective, without  
2 realizing that I -- I know he knows I sit down  
3 the hallway from Diego. But the amount of  
4 communications that I have with each member of  
5 the team isn't necessarily known to other  
6 members of the team; right?

7 Q. In any event, you didn't share this email with  
8 either the Government or the Defendant prior to  
9 the trial; correct?

10 A. I imagine this is one of the 600.

11 Q. It is?

12 A. Yeah, so I don't believe so.

13 MS. BROWN: Can we bring up Exhibit Gg,  
14 which is also docket number -- document number  
15 164-2? And if we could pull up the bottom  
16 paragraph of that, "a couple of notes."

17 (Pre-marked Defendant's Exhibit Gg  
18 introduced.)

19 Q. (By Ms. Brown) So in this email -- and maybe  
20 it would be helpful if I gave a little bit of  
21 background here. This is October 1, 2018. As  
22 I recall, and feel free for you or even the  
23 Government to correct me, you're putting  
24 together the report for United Way -- the  
25 slides that we saw earlier -- some version of

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1           them.

2                   And in discussing finalizing that report  
3           with who you refer to as "John C.," and this is  
4           from Chris Fitzgerald, he says that a "trending  
5           of total United Way MB budget v. IT budget was  
6           not" and he uses the word "fruitful" -- "over  
7           the period analyzed. They each had a 7 percent  
8           cumulative increase, and generally trended  
9           together. We have therefore not included a  
10          slide to show this."

11                  And you -- that email is actually directed  
12          to you and Ron Haas; correct?

13   A.    Yes, it's directed to us.

14   Q.    So the team at RSM decided that doing a slide  
15          about the budget comparisons either post, pre  
16          Mr. Alrai were not fruitful, and that was  
17          because they didn't show anything that tended  
18          to establish loss or fraud; right?

19   A.    No, I don't know that the context -- I think  
20          "fruitful" -- I don't know what the term was  
21          intended to imply, other than you look at it --  
22          number one, I think this was included in the  
23          report. And this is a report to the special  
24          committee.

25                  And, number two, I think this was part of

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1 my testimony in court. So the fact that  
2 United Way had an inflated IT budget before it  
3 hired Imran, and then continued to be elevated  
4 during Imran's tenure and go at a 7 percent  
5 clip, was part of, I think, the factual  
6 background of this case. I think he was -- I  
7 just don't know what was meant by the term  
8 "fruitful" other than -- I just -- I would only  
9 be speculating.

10 Q. But a slide along the lines showing this was  
11 not included in the presentation that you made  
12 to United Way?

13 A. Is that true? I don't know.

14 Q. Well, I'm asking you.

15 A. I thought it was disclosed, yeah. The budget  
16 and the trends, I thought was. I could be  
17 wrong, but I thought it was.

18 Q. It's just that the way I'm reading this email,  
19 it sounds like that Chris left out a slide on  
20 this.

21 A. No, I think he was providing commentary. I  
22 don't know that it says it was left out.

23 Q. Yeah, the last sentence it does.

24 A. Okay.

25 Yeah, I don't recall whether it ultimately

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1 was left out. I have some inclination that it  
2 was included, but I don't know why. So,  
3 apologies.

4 MS. BROWN: If I could just have a moment,  
5 Your Honor. I'm looking through my notes and  
6 there's questions I've already asked.

7 THE COURT: Thank you. Take your time.

8 MS. BROWN: Thank you. It always happens  
9 when I get close to the end.

10 That is all of my questions. I had asked  
11 all the other ones already.

12 THE COURT: Mr. Davis, it's your witness.  
13

14 CROSS-EXAMINATION

15 BY MR. DAVIS:

16 Q. So, Mr. Naviloff, you did an alternate loss  
17 calculation based on personal enrichment; is  
18 that right?

19 A. Yes, that's correct.

20 Q. And what was the approximate amount of loss  
21 calculated using that technique?

22 A. Approximately \$3.7 million.

23 Q. Have you been asked a single question in the  
24 four hours you've been testifying about that  
25 loss calculation?

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1 A. I don't believe I have.

2 Q. You were asked about Mr. Commisso as a  
3 gatekeeper; do you recall those questions?

4 A. Yes, I do.

5 Q. Now, I want to ask you, what was Mr. Commisso a  
6 gatekeeper of once you were engaged by the U.S.  
7 Attorney's Office? Do you recall?

8 A. Well, anything to do with United Way's books  
9 and records, particularly where they may not  
10 have related to our loss calculation. And that  
11 was a significant concern of his, right, that  
12 that information would be provided. But aside  
13 from that, nothing that the U.S. Attorney's  
14 Office provided me was subject to his review,  
15 or his inspection, or his analysis.

16 Q. So just to be clear, well before you were  
17 engaged, United Way provided the United States  
18 Attorney's Office with a huge collection of  
19 data from United Way; are you familiar with  
20 that?

21 A. That's correct, yes.

22 Q. And that was in response to grand jury  
23 subpoena?

24 A. That was my understanding yes.

25 Q. And that included essentially every document

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1 about loss and your loss calculation that  
2 Mr. Commisso identified; correct?

3 A. Yes, that included significant documentation  
4 from DigitalNet and his other affiliated  
5 businesses, and the costs and revenues -- or  
6 monies received and monies spent associated  
7 with those businesses.

8 Q. And, of course, Mr. Commisso waived United  
9 Way's privilege regarding its internal  
10 investigation about that loss calculation in  
11 order to reveal all those documents; correct?

12 A. Yes. That's my understanding, yes.

13 Q. United Way was not asserting a privilege  
14 regarding anything that it had regarding your  
15 loss calculation; correct?

16 A. That's my understanding, yes.

17 Q. But after you were engaged in the summer of  
18 2019, as trial neared, there were additional  
19 discovery requests for United Way documents; is  
20 that correct?

21 A. That's correct, yes.

22 Q. And in those additional discovery requests,  
23 there were new documents identified that were  
24 in United Way's possession; right?

25 A. "New documents in United Way's possession,"

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1 meaning...

2 Q. That is, documents that had not been turned  
3 over initially.

4 There were at least some additional  
5 documents?

6 A. Yes, there were additional documents --  
7 additional requests and additional documents  
8 that were provided.

9 Q. And there were also additional documents  
10 provided by RSM from its engagement with  
11 United Way; right?

12 A. Correct. Yes.

13 Q. All right.

14 And when a new discovery request came in  
15 as trial neared in 2019, Mr. Commisso did serve  
16 as gatekeeper to determine whether particular  
17 new documents were privileged; is that right?

18 A. That's correct. There was a lot of comingling  
19 of work streams and certainly some sensitivity,  
20 particularly with identifying the relevance of  
21 some of the documents.

22 Q. And in the case of new documents like that, one  
23 of the things you did was communicate with  
24 Mr. Commisso about whether there was a  
25 privilege for specific documents; is that

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1 correct?

2 A. Correct.

3 MR. DAVIS: I'm sorry. I'm just trying to  
4 shield my face from the sun's rays.

5 THE COURT: If you need to get up and  
6 close that or whatever, feel free.

7 MR. DAVIS: Sorry, Judge.

8 THE COURT: No problem. That's about as  
9 good as it gets.

10 Q. (By Mr. Davis) So, Mr. Naviloff, your personal  
11 enrichment analysis depended on documents in  
12 addition to United Way documents; is that fair  
13 to say?

14 A. That's correct. Those are Mr. Alrai's business  
15 records, primarily.

16 Q. Was one of the things that you needed to review  
17 the records, actually, of DigitalNet, the  
18 company we're talking about here?

19 A. Correct.

20 Q. And did the Government share with you numerous  
21 documents that had been seized at Mr. Alrai's  
22 home in New Hampshire from his home office that  
23 purported to be DigitalNet records?

24 A. That's my understanding of the origin.

25 Q. And you reviewed those documents as part of



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1           your work and your engagement for the  
2           Government; correct?

3       A.     That is correct. Yes, I did.

4       Q.     And United Way and Mr. Commisso didn't have  
5           those documents right? That's not something  
6           that was in their collection?

7       A.     That is correct.

8       Q.     And, in fact, one of United Way's great  
9           challenges in this entire investigation is that  
10          they don't have any DigitalNet documents; is  
11          that fair to say?

12      A.     That's correct.

13      Q.     That is, other than the documents that  
14          DigitalNet submitted to them like invoices,  
15          they don't have what actually happened at  
16          DigitalNet; correct?

17      A.     They have -- they don't have, obviously,  
18          DigitalNet's books and records. They don't  
19          have their costing information. They don't  
20          have cash receipts information -- those types  
21          of records.

22      Q.     And the only records, as far as you know, that  
23          exists of those things are what Mr. Alrai had  
24          himself at his house; right?

25               MS. BROWN: I have an objection. I may be

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1 missing something, but I don't know if the  
2 Government's argument is that the -- the Brady  
3 violation is excused because the Defendant  
4 didn't turn over documents. I'm not following  
5 why that he didn't produce documents is  
6 relevant to them not producing documents.

7 THE COURT: He didn't -- when you say  
8 "he"...

9 MS. BROWN: Mr. Alrai. That's what I'm  
10 understanding this line of questions to be  
11 about -- that there were documents that they  
12 didn't get access to.

13 THE COURT: I don't want to speak for  
14 Mr. Davis, but what I'm drawing from this, for  
15 better or worse, is that, basically, you can't  
16 show prejudice because a lot of this work done  
17 by the expert was not based on the loss  
18 calculation as to United Way, but as to unjust  
19 enrichment as to your client. And, therefore,  
20 any failure to produce any of these emails, et  
21 cetera, is nonprejudicial.

22 Mr. Davis, have I got that right? You can  
23 tell me -- if I got it wrong, you can disabuse  
24 me.

25 MR. DAVIS: That's correct, Judge.

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1 THE COURT: So it's not that it excuses  
2 it. It's that it renders it nonprejudicial.  
3 That's the argument.

4 Let me ask you this, Mr. Davis. And this  
5 is not an attack. It's just a question.

6 Did you brief this argument?

7 MR. DAVIS: Judge, Mr. Hunter briefed it.  
8 I think he did, unless we were both in trial in  
9 front of you that month.

10 THE COURT: It might have gone over me.

11 Mr. Hunter, did you brief this argument?

12 MR. HUNTER: Yes. I think it's both in  
13 the -- I think definitely in our objection, and  
14 I think I might have mentioned it in our  
15 surreply.

16 THE COURT: Thank you, sir.

17 You may proceed, Mr. Davis. Objection  
18 overruled.

19 MR. DAVIS: Thank you, Judge.

20 Q. (By Mr. Davis) So Mr. Commisso was not the  
21 gatekeeper of the DigitalNet documents that you  
22 were able to review; is that correct,  
23 Mr. Naviloff?

24 A. That's correct.

25 Q. Is it also fair to say that you reviewed a

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1 great many bank records in this case?

2 A. Yes, that's correct.

3 Q. And did those bank records include the  
4 DigitalNet bank records?

5 A. Yes, they did.

6 Q. And did they also include the ASA Consulting  
7 bank records?

8 A. Yes, they did.

9 Q. And did they also include Mr. Alrai's and his  
10 wife's bank records?

11 A. I believe so, yes.

12 Q. And did you also review investment accounts  
13 that Mr. Alrai and his family held?

14 A. I believe we had some information with respect  
15 to transfers for investment accounts.

16 Q. And did you also have information about real  
17 estate purchases that Mr. Alrai had made?

18 A. Yes.

19 Q. And did you also have information about  
20 \$1.2 million that Mr. Alrai transferred to  
21 Pakistan?

22 A. Yes, that's correct.

23 Q. And did you also have tax records for ASA  
24 Consulting?

25 A. Yes, that's correct.

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1 Q. And did you have tax records that reflected the  
2 supposed business expenses and revenues of  
3 DigitalNet?

4 A. Yes, I did.

5 Q. And did you also have all of Mr. Alrai's own  
6 personal income tax filings?

7 A. Yes, I believe I did.

8 Q. And did all of those documents inform your  
9 judgment about personal enrichment by  
10 Mr. Alrai?

11 A. Yes, they did.

12 Q. And did you also have credit card records that  
13 showed Mr. Alrai's credit card expenditures  
14 over years of conduct?

15 A. Yes, I did.

16 Q. Now, for any of the documents we've just  
17 discussed, did Mr. Commisso serve as some sort  
18 of gatekeeper?

19 A. No, he did not.

20 Q. Was he the puppet master of what you were able  
21 to review in formulating your opinion?

22 A. Not at any point.

23 Q. All right. Let's talk a little bit about  
24 Ryan Gilpin.

25 How old is Mr. Gilpin?

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1 A. Well, 2020, so I'm doing my math in the head.

2 I believe that he's in his late 20s.

3 That's a guess.

4 Q. And are you familiar with his educational  
5 credentials?

6 A. Yeah. So he's got a bachelor's degree in  
7 computer information systems, and a master's in  
8 information technology, I believe, from  
9 Bentley -- both from Bentley.

10 Q. And when did he earn his master's degree in  
11 information technology?

12 A. I believe it was 2007. I'm serving from  
13 memory. 2017, sorry.

14 Q. And did he do work in the field prior to  
15 obtaining his master's degree in information  
16 technology?

17 A. Yes. My understanding is he had worked with  
18 the information technology departments at his  
19 university prior to being employed by RSM.

20 Q. And for how many years?

21 A. I believe it was two years.

22 Q. And do you know if he also worked in management  
23 consulting in IT?

24 A. For RSM, yes, for approximately two years.

25 Q. And so was that before his assignment to work

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1 on this particular loss analysis?

2 A. Yeah, that's my recollection.

3 Q. And do you know what his management consulting  
4 work was done in?

5 A. The area in and around IT outsourcing. It  
6 included automation and digital transformation.  
7 It included IT consulting services that  
8 included RSM's various software and hardware  
9 solutions that we deliver to our clients.

10 Q. And so has it been your experience with  
11 information technology that sometimes, young  
12 people are really indispensable to  
13 understanding complicated IT stuff?

14 A. Yeah, that's been my experience. And Ryan did  
15 a great job throughout this project.

16 Q. That's why Mr. Davis relies on Mr. Hunter all  
17 the time.

18 MS. LE: I'm also called upon to help John  
19 with IT issues. I just want to point that out.

20 MR. DAVIS: I'm not going to comment on  
21 Ms. Le's age, Your Honor.

22 THE COURT: I'd pass that one up too.

23 Q. (By Mr. Davis) So, Mr. Naviloff, did you  
24 regard Ryan Gilpin as essentially an  
25 unqualified college intern who found himself

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1 working on this project?

2 A. Those would absolutely not be my words. He's a  
3 bright young IT professional who performed well  
4 in the limited role that I provided to him,  
5 which was really fact-finding, and analyzing  
6 invoices, and putting facts together, right,  
7 with respect to information contained on the  
8 documents that were provided.

9 Q. And when you were engaged by United Way to be  
10 an expert, did you believe that what you were  
11 supposed to do was to do all of the work on  
12 that account yourself and bill at your rate?

13 A. United Way couldn't afford that. But, yeah --  
14 no, it's not how any of the projects I've ever  
15 worked on would transpire.

16 Q. Can you explain that a little more? What do  
17 you mean by that?

18 A. Yeah.

19 If you're doing basic data entry, you're  
20 not going to have a 20-plus-year experienced  
21 professional, at over \$500 an hour, typing data  
22 into a spreadsheet; right? So a lot of what we  
23 were doing was a data-intensive collection of  
24 invoice details so that we could put them in  
25 spreadsheets, so that we could then read/review



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1 the specific text next to those descriptions,  
2 putting them in, collating them, and organizing  
3 them. So there's some amount of just  
4 digitizing and structuring data organization.  
5 That's not work that would be done by  
6 senior-level individuals.

7 Q. Were you doing something deceptive or secret  
8 from your client, United Way, by using  
9 associates on various parts of the project?

10 A. No. This is common industry practice.

11 MR. DAVIS: No further questions.

12 THE COURT: Thank you.

13 Any redirect, Ms. Brown?

14 MS. BROWN: Yes, a couple of things.

15  
16 REDIRECT EXAMINATION

17 BY MS. BROWN:

18 Q. Mr. Naviloff, when you were cross-examined at  
19 trial about your own lack of expertise in the  
20 area of IT and you were cross-examined on that  
21 by Attorney Harrington, your response wasn't  
22 "Hey, I've got this young guy who's really  
23 good. We all know young people are better at  
24 IT."

25 You didn't say that, did you?

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1 A. Did I say I had 1,200 consultants at RSM who  
2 provide IT services? Did I say -- yes, I  
3 have Diego Rosenfeld informing me --

4 THE COURT: Mr. Naviloff, answer the  
5 question.

6 THE WITNESS: Did I mention Ryan by name?  
7 I'd have to go back. I don't know.

8 Q. (By Ms. Brown) My point is that when you were  
9 confronted with the lack of your own expertise,  
10 your go-to response was to say, "I've got a  
11 seasoned IT expert on my team"; that was your  
12 go-to response; correct?

13 A. And that's an accurate statement.

14 Q. Yes.

15 And having a seasoned IT expert on your  
16 team would add more credibility to your  
17 opinions than, say, "I consulted with someone  
18 right out --three, four years out of college."

19 That's why you went with the experienced  
20 person as an example of someone you consulted  
21 with --

22 A. I believe my testimony was -- speaks for  
23 itself, but it was reference to Diego Rosenfeld  
24 and his team. It was clear. There was no real  
25 ambiguity. There was no trickery here.

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1 Q. Now, the Government asked you several questions  
2 about the fact that you weren't asked about  
3 personal enrichment today, but that you  
4 testified about it at trial; correct?

5 A. Sorry. Say that again.

6 Q. Okay. Maybe I spoke too fast.

7 When you were just examined by  
8 Attorney Davis, he asked you several questions  
9 about the fact that at trial, you testified on  
10 personal enrichment by Mr. Alrai or unjust  
11 enrichment by Mr. Alrai.

12 A. Yes, that's correct.

13 Q. And that you weren't asked questions by me  
14 earlier during direct examination.

15 That was a question Attorney Davis asked  
16 you; correct?

17 A. Correct.

18 Q. Now, a person's enrichment, in and of itself,  
19 doesn't prove that they committed fraud; right?

20 A. Well, I'd been asked to assume fraud occurred.  
21 I'd performed two calculations, right, to  
22 quantify the amount.

23 Q. I understand you were asked to assume fraud.  
24 Which means if you were asked to assume fraud,  
25 you were not -- at least to what your position

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1 is, you were not offering testimony to prove  
2 fraud; correct?

3 A. That's correct. I was quantifying the loss in  
4 the enrichment.

5 Q. So you didn't offer any testimony to show or to  
6 prove that there was excessive billing in this  
7 case; right?

8 A. The monies that went into Mr. Alrai's accounts  
9 was from United Way. That, I saw in the  
10 records.

11 Q. I'm trying to get back to the fact that you  
12 have said and the Government has said you  
13 didn't offer testimony regarding fraud;  
14 right -- that's your testimony today?

15 A. That's fair. Yes, I'm assuming fraud.

16 Q. So if you're assuming it, you're not proving  
17 it; right?

18 A. That's correct.

19 Q. So if you're not proving fraud, then your  
20 testimony -- you weren't attempting to prove  
21 excessive loss. You were just attempting to  
22 show evidence of the loss -- excuse me.

23 You weren't trying to prove excessive  
24 billing; you were trying to prove the loss  
25 associated with this excessive billing;

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1 correct?

2 A. There's a distinguishment. I guess I'm trying  
3 to pick up what you're distinguishing between.

4 Q. I guess what my point is is that the Government  
5 has represented several times, both before  
6 trial and after trial, that you were not called  
7 as a witness to prove fraud; is that your  
8 understanding?

9 A. Yes.

10 Q. You were told to presume fraud and then get to  
11 the next step, which was if there was fraud,  
12 what was the loss associated with it?

13 That was your understanding of the purpose  
14 of your testimony?

15 A. Right. That's the trier of fact to prove  
16 fraud.

17 Q. And if you were assuming that fact and not  
18 proving it, then your testimony did not  
19 establish that there was fraud; if anything, it  
20 only established that -- what the loss was if  
21 there was fraud?

22 A. Correct.

23 Q. And so to the extent that there was quote,  
24 unquote, "unjust enrichment" on the part of  
25 Mr. Alrai, that would be completely irrelevant

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1 if there was no fraud; right? If he had money  
2 in that period of time, and got credit cards,  
3 and bought clothing, or whatever he bought --  
4 or houses, but there was no proof of fraud,  
5 having more money by itself doesn't prove that  
6 you committed fraud?

7 A. If that was a legitimate business, then, yeah,  
8 having excess -- having excess profits is what  
9 it is; right?

10 Q. Right.

11 And "legitimate" being the operative word  
12 here. So either it's legitimate or it's not  
13 legitimate, and that was what the issue was at  
14 trial in terms of whether he committed fraud;  
15 right?

16 A. Yeah. So we looked at it.

17 Undelivered, overbilled, right, or  
18 duplicative; right? So those, by their nature;  
19 right -- if you're being paid twice, it could  
20 be problematic; right? Not delivering services  
21 can be problematic, but those are contractual  
22 issues and concerns as well.

23 Q. But what you're admitting is -- you're  
24 admitting that you made a conclusion that he  
25 had been unjustly enriched; but the conclusion

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1 was based on a premise that may or may not be  
2 true, but you didn't offer opinions on the  
3 premise of whether he committed fraud?

4 A. Correct.

5 MS. BROWN: Nothing further.

6 THE COURT: Mr. Davis?

7 MR. DAVIS: You know, I have really just  
8 one question.

9

10 RE CROSS-EXAMINATION

11 BY MR. DAVIS:

12 Q. And it doesn't go so much into any kind of  
13 disclosure. It goes to more the job you were  
14 given in this case.

15 The idea of assuming fraud and then  
16 opining on a loss, which is what you're charged  
17 with here; right? I mean, obviously, it wasn't  
18 as simple as deciding -- taking a date that he  
19 started and picking a date that he ended, and  
20 attributing all economic loss to the fraud;  
21 right? That's not how it's done.

22 A. So from start to finish; right? So I've used  
23 two calculations.

24 Q. Yeah.

25 A. And these are estimates based upon the records

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1 I've been able to look at. So nothing is  
2 necessarily perfect when you don't have every  
3 granular detail. But the first approach was to  
4 measure those three elements, right, where  
5 there were clear markups for reoccurring  
6 services that were related to the technology;  
7 right? So, essentially, paying extra for  
8 bandwidth or paying extra for server --

9 Q. I've got to stop you.

10 I understand all that.

11 A. Okay. Got you.

12 Q. What I'm saying is, you didn't just simplify --  
13 simplistically pick two dates, start of  
14 employment and end of employment, and attribute  
15 everything to fraud; right -- that's not the  
16 way you did it?

17 A. No. That's not now I calculated 3.1. There  
18 was lots of activities that could have been  
19 legitimate that never made its way into the  
20 3.1.

21 Q. You're drawing exactly what I am --

22 A. Yeah.

23 Q. Here's my problem -- this idea of assuming loss  
24 and -- assuming fraud and establishing loss.  
25 To prove fraud, you've got to prove causation.



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1 You've got to prove that the fraudulent  
2 activity -- the conduct resulted in a loss of  
3 some amount.

4 So isn't the idea of a loss inextricably  
5 tied to specific different instances of  
6 fraudulent conduct? You can't just assume  
7 every dollar lost in the time period is  
8 fraudulently lost. It's got to be attributed  
9 to something, some conduct of the Defendant.

10 Didn't that require you to make judgments  
11 about what conduct was fraudulent?

12 A. The formation of the business; right. So that  
13 business as a whole -- the way it was developed  
14 was fraudulent. And that's what we've been  
15 asked to assume. So the business, in and of  
16 itself -- there's no practical need, if you're  
17 an IT director, to go and create another  
18 business that then marks up these costs and  
19 then just passes them back to United Way;  
20 right? So the very construct of the business  
21 is what was -- in my understanding, is what the  
22 concern is.

23 Q. You mean DigitalNet?

24 A. Yes.

25 Q. Okay.

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1 A. Sorry, DigitalNet, yes. So that's the nexus  
2 for me; right.

3 As soon as you say, "Okay. I created an  
4 entity, and this is what I do for a living" --  
5 this isn't novel. An entity is set up; right?  
6 It's not transparent. And it's making excess  
7 profits; right?

8 MR. HUNTER: Your Honor, I can speak to  
9 what we asked him to assume specifically, which  
10 is -- and this is in his report. We asked him  
11 to assume that Alrai fraudulently obtained all  
12 the contracts between United Way and  
13 DigitalNet.

14 And so the idea being is as Mr. Naviloff  
15 just said -- because he fraudulently obtained  
16 the contracts, any loss associated to that is  
17 fraud as part of the scheme to defraud that was  
18 proved at trial.

19 THE COURT: Any loss associated with that;  
20 right? To be honest, I've been debating all  
21 morning whether I should ask Counsel this  
22 question or ask the witness, to be honest.  
23 And, you're showing me where they both make  
24 sense, but I just wanted the witness' take on  
25 it.

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1           So any loss that you bring to that  
2       business -- does that mean any dollars paid to  
3       that business? No -- right? It doesn't,  
4       because it has to be excess dollars, dollars  
5       that wouldn't have otherwise -- right?

6           THE WITNESS: Yes.

7           THE COURT: I guess all I'm trying to say  
8       is that I understand it's part of the  
9       Government's argument that this testimony  
10      didn't go to anything but loss; right? Other  
11      witnesses, other evidence established the  
12      Defendant's fraudulent conduct. But I think  
13      that is a -- that's a difficult concept,  
14      because the idea -- to me, the idea of opining  
15      on loss requires not just assumptions that a  
16      fraudulently created business leads to loss,  
17      but that certain conduct by the business -- and  
18      certain conduct by the business actually caused  
19      loss -- not everything the business did. Now  
20      I'm opining.

21           But you're nodding, Mr. Naviloff. You  
22      understand what I'm saying?

23           THE WITNESS: Yes, I do.

24           THE COURT: I'll probably talk to Counsel  
25      more about that at some point in this

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1 proceeding, but, thank you.

2 I think the witness is excused.

3 MS. BROWN: Your Honor, real briefly,  
4 there's just one question I have on this. And  
5 it's on this exact thing, so hopefully it will  
6 illuminate.

7 I apologize. I did not make this an  
8 exhibit, but there was an email about this.  
9 And I can -- I'll just share with the  
10 Government, it's -- of the recent production,  
11 it ends in 00-4-A. But it's an email about  
12 this, and I just want to ask a question about  
13 this.

14  
15 REDIRECT EXAMINATION

16 BY MS. BROWN:

17 Q. So this email's dated November 7, 2018. It's  
18 from Fitzgerald to Naviloff. And I just want  
19 to read.

20 It says, "Greg, here are a list of items  
21 that I would ask the USAO about. One is  
22 consideration of the 'net work method' --  
23 that's in quotes -- "analyze Alrai's networth  
24 at 12/31/2011 versus 6/30/2018. Change in  
25 networth, less known income salary and known

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1 expenses, mortgage, fraudulent proceeds." And  
2 it basically explains whether he's using the  
3 money for other things like developing an app  
4 or sending money to Africa.

5 So I wanted to ask the witness, was that a  
6 discussion that you had with the U.S.  
7 Attorney's Office prior to indictment? Because  
8 that's about, I think, three weeks or two weeks  
9 before the indictment.

10 Do you remember having a conversation  
11 about using the "net work method"?

12 A. Yeah, I don't think I did. I know that was  
13 something that Chris was suggesting. But at  
14 that point, we hadn't been engaged to do  
15 anything. I think there was just a question  
16 mark as to -- and Chris perhaps being overeager  
17 to figure out whether there was additional  
18 analyses that could benefit the Government.

19 Whether we did that work or someone else  
20 did that work, there were certainly other  
21 analyses that would further serve to assist the  
22 Government in their efforts, apart from the  
23 work that we had done just to date with the  
24 loss analysis.

25 Q. And that is not an analysis you did when you

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1           were working for United Way?

2       A.     No.

3           MS. BROWN: Thank you, Your Honor.

4           THE COURT: Thank you. All right.

5       Mr. Naviloff's excused.

6           Ms. Brown, you can call your next witness.

7           MS. BROWN: Attorney Eaton is going to  
8       call Mr. Sgro.

9           THE COURT: Please proceed, Mr. Eaton.

10          MR. EATON: Can the Court swear Mr. Sgro  
11       in?

12          THE CLERK: Mr. Sgro, please raise your  
13       right hand.

14          Do you solemnly swear or affirm that the  
15       testimony you're about to give will be the  
16       truth, the whole truth, and nothing but the  
17       truth, so help you God?

18          MR. SGRO: I do.

19          THE CLERK: For the record, please state  
20       your full name and spell your last name.

21          MR. SGRO: It's Jason Joseph Sgro,  
22       S-G-R-O.

23          THE CLERK: Thank you.

24

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DIRECT EXAMINATION

BY MR. EATON:

Q. Mr. Sgro, did you review the Defendant's motion to dismiss, and the Government's objection to that motion, and the other related pleadings?

A. I did.

Q. Did you also review the documents that had been produced after trial?

A. I did.

Q. And did the Defense ask you to write a report about your expert opinions related to that motion to dismiss and the newly discovered evidence?

A. Yes, they did.

Q. In writing that report, did you review the trial transcripts in this matter?

A. I did.

Q. And did you address how the new discovery impacts Mr. Naviloff's filings as to the categories of loss?

A. Yes, I did.

Q. And do you recall the categories of loss that Mr. Naviloff analyzed?

A. Yes. That's duplicative billing, billing for services not rendered, and excessively billing.

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1 Q. So we're going to talk about some examples,  
2 and -- most of which you cite in that report of  
3 the new discovery -- and how that would have  
4 impacted your testimony. So let's start with  
5 excessive billings, of the three categories.

6 Are you aware that in finding Mr. Alrai  
7 guilty, the Court made a finding that there  
8 was, in fact, excessive billing, or  
9 astronomically excessive markups?

10 A. I am aware of that, yes.

11 Q. And do you recall that Mr. Naviloff testified  
12 as to excessive billing or markups?

13 A. Yes, I do recall that.

14 Q. And do you recall that testimony was with  
15 respect to the telephony system?

16 A. Yes. I believe it was with regard to the  
17 company SIP.US.

18 Q. Can you briefly describe what that opinion was?

19 A. Yeah.

20 So Mr. Naviloff presented an opinion that  
21 there was a really high markup -- I won't be  
22 exact here, but, like, 800 percent or more on  
23 the SIP.US. service as part of a markup for the  
24 telephony services between DigitalNet and the  
25 United Way.



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1 Q. And did you give testimony about that  
2 particular opinion?

3 A. I did.

4 Q. And what was that testimony?

5 A. So I believe that that's not accurate for a  
6 couple reasons, first of which being that if  
7 you look at the invoices for SIP.US -- to  
8 between the SIP.US company and DigitalNet,  
9 they're a couple hundred dollars a month --  
10 something in that realm. Excuse me that I'm  
11 not being precise.

12 And then if you look at the invoices for  
13 the entire managed telephony service between  
14 DigitalNet and the United Way, it appears that  
15 Mr. Naviloff is comparing those and assessing  
16 that that's an apples-to-apples comparison,  
17 when, in fact, SIP.US is a general fraction of  
18 what it would cost to produce a telephony  
19 service -- an actual working telephone. And  
20 just to put that in really easy terms, if you  
21 were to buy just SIP.US and pick up the phone,  
22 you don't get a dial tone. Like, nothing  
23 happens. It's a part of a system.

24 And so to say that that is the totality of  
25 the cost, and, thus, the markup must be all of

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1           these -- you know, a 1,000 percent or  
2           800 percent or something, it is not accurate.

3       Q.   Is there a specific document that you reviewed  
4           from the newly produced posttrial discovery  
5           that would have bolstered your opinion on the  
6           erroneous analysis that Mr. Naviloff gave as  
7           this issue?

8       A.   Yes, there is.

9                   MR. EATON: Tracy, can you pull up  
10           Exhibit Pp?

11                   (Pre-marked Defendant's Exhibit Pp  
12           introduced.)

13       Q.   (By Mr. Eaton) Mr. Sgro, is this one of the  
14           documents that you looked at with regard to a  
15           SIP.US issue?

16       A.   Yes. This appears to be one of them, yes.

17                   MR. EATON: And what -- actually, I'll  
18           have -- Tracy, if you can pull out the bottom  
19           half of that email, starting with "all" and  
20           going -- yeah, perfect.

21       Q.   (By Mr. Eaton) So can you tell me, Mr. Sgro,  
22           what this email says to you in terms of  
23           Mr. Naviloff's opinion?

24       A.   Yeah.

25                   So I believe -- I can't see the top, but I

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1 believe that essentially, what this is is this  
2 is a conversation that is happening with a  
3 person by the name of Mark Amick, who is the  
4 COO at this SIP.US company. And he is  
5 confirming that the service -- the account was  
6 set up in October 2014. The service was active  
7 beginning November 2014. And it talks briefly  
8 about the DID cost and 911 costs of the  
9 service.

10 Q. Now, would having this information have  
11 bolstered your ability to respond to any claim  
12 that Mr. Naviloff made with regard to SIP.US  
13 service at trial?

14 A. Yes.

15 So this is important because this starts  
16 to show some of the cost modeling of SIP.US, as  
17 well as the service (audio drops) --

18 Q. I'm sorry. I missed that last part.

19 THE COURT REPORTER: Same.

20 THE WITNESS: I apologize. That was -- it  
21 talks to some of the cost modeling of SIP.US,  
22 as well as how many numbers were associated  
23 with the account and the start date of the  
24 service.

25 Q. (By Mr. Eaton) Okay.

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1           Now, do you recall at trial that  
2           Mr. Naviloff asserted that the contract for the  
3           management of the phone system that he was  
4           reviewing, which was signed in 2013, relates  
5           directly to the management of SIP.US? Do you  
6           recall, generally, that testimony?

7       A.   Yeah, I do recall that. And I did testify, I  
8           believe at trial as well, that this timeline is  
9           inaccurate; right? He is asserting,  
10          incorrectly, that the -- a contract that is  
11          signed, oh, a year, roughly, before this  
12          service exists in the context of the United Way  
13          is somehow to manage that service.

14       Q.   So now more broadly with respect to  
15          Mr. Naviloff's opinion in terms of excessive  
16          billing and markups, and based on this email  
17          and the testimony that he gave at trial, what  
18          does this tell you about his knowledge of  
19          SIP.US versus a traditional, copper  
20          wire-supported phone system?

21               What does it tell you about the validity  
22          of his opinions when he's talking about this  
23          telephony system?

24       A.   Yeah, so, I think we can clearly see, because  
25          of the not apples-to-apples comparison that is

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1 made over the costing, as well as kind of a  
2 confusion about when contracts are signed and  
3 what technical services those contracts belong  
4 associated to shows that -- and I believe  
5 Mr. Naviloff has asserted this as well -- that  
6 he's not an IT expert. And, yeah, so I would  
7 say that that shows his lack of expertise in  
8 this area.

9 Q. Do you recall being cross-examined about the  
10 various markups in this case?

11 A. I do.

12 Q. And do you also recall that the Judge asked you  
13 at trial about your opinions on the markups?

14 A. I do.

15 Q. And do you recall your reply in reference to  
16 these questions on markups was that you  
17 couldn't say they were reasonable because you  
18 weren't able to evaluate the service?

19 A. Yeah. So there's a couple -- there's always  
20 some ways of kind of getting to the heart of a  
21 technical analysis. And one of the things that  
22 would have been good to do is not only take the  
23 SIP.US costs, but also an evaluation of the  
24 other services -- the telephony phone-specific  
25 services. These are things like network,

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1 voicemail, engineering management -- the actual  
2 software licensing that the phone runs.

3 All of this should be a part of an  
4 analysis of what the cost was to deliver the  
5 telephony service, as a comprehensive-managed  
6 telephony service, in order to present a  
7 correct analysis of this.

8 Q. So I'd like to now turn to "Duplicative  
9 Billing," the second of the three categories.

10 Are you aware as well that in finding  
11 Mr. Alrai guilty, the Judge made a finding that  
12 there was, in fact, duplicative billing?

13 A. I am aware that he made that finding.

14 Q. And do you recall whether Mr. Naviloff  
15 testified about duplicative billing?

16 A. Yes, I believe he did.

17 Q. Do you recall that testimony regarding  
18 duplicative billing as to a service called  
19 CloudConnect?

20 A. Yes, I do recall that.

21 Q. Can you briefly, if you can recall, describe  
22 what that opinion was in terms of duplicative  
23 billing?

24 A. Mr. Naviloff's opinion?

25 Q. Yes.

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1 A. So Mr. Naviloff believed that during a period  
2 of some time, that there was duplicate invoices  
3 sent for similar or the same, I think, in his  
4 opinion, services. And, thus, those invoices  
5 were duplicative.

6 Q. And what was your response to that opinion?

7 A. I don't find -- this goes to kind of my  
8 approach here.

9 I made no assumption of fraud; right? So  
10 I'm here to look at the actual facts in the  
11 environment that were presented, and analyze  
12 them as objectively as is reasonable for me to  
13 do so. And so when you look at the data about  
14 those services, you actually -- you can't come  
15 just to the conclusion that these are  
16 duplicative. And that's for a bunch of  
17 reasons; right?

18 The first of which is they are -- services  
19 can be transitioned; right? So that's when a  
20 company maybe starts one service and ends  
21 another, you overlap them for a time period;  
22 right? That's a reasonable -- that's a reason  
23 for having maybe a duplicate invoice.

24 You could also have the services in  
25 simultaneity, right, as a capacity. And these

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1 are -- when you read these contracts, they are  
2 not identical in every sense of the word from a  
3 technical standpoint. So there's a couple of  
4 different options that could be possible here,  
5 some circumstances where they would not be  
6 duplicative. And if you don't assume fraud, I  
7 think you don't necessarily choose the  
8 narrative that supports fraud.

9 MR. EATON: So I'd like to look at another  
10 post-trial discovery email.

11 And, Tracy, if you could pull up Nn. And  
12 can you zoom in on, I guess, the first half of  
13 the page or so? Hopefully, that will be big  
14 enough. That's good.

15 (Pre-marked Defendant's Exhibit Nn  
16 introduced.)

17 Q. (By Mr. Eaton) Can you see that?

18 A. I'll do my best.

19 Q. Yeah, let us know. We can zoom into it further  
20 if there's something you want to discuss.

21 So I want -- you just mentioned that there  
22 are plausible explanations for why two services  
23 could be billed at the same time, even if they  
24 appear similar.

25 And "plausible" was the word that you used



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1 to describe that possibility at trial; right?

2 A. Yeah, I believe that that's a reasonable  
3 alternative circumstance, yep.

4 Q. But you didn't -- you didn't have anything to  
5 point to; right? You could speculate that  
6 there could be these reasonable alternatives,  
7 but you didn't have any document to show, like,  
8 yep, this is what was happening?

9 A. No. I was certainly devoid of any information  
10 like what we're looking at right now.

11 Q. And that's a perfect segue.

12 Can you tell us what we're looking at  
13 right now, and how that fits into what we're  
14 discussing?

15 A. So this appears to be an email from  
16 Mr. Ryan Gilpin to Chris Fitzgerald, copying  
17 Mr. Naviloff and a person by the name of  
18 Evan DaSilva -- apologize if I mispronounce  
19 that -- talking about the CloudConnect  
20 duplicative billing. Again, I'm just kind of  
21 summarizing.

22 And the -- over the -- Mr. Gilpin is  
23 saying in the maybe third paragraph down,  
24 "There may have been some overlap in the  
25 services provided by Insight and CloudConnect,

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1 as it appears that the contract start for  
2 Insight overlaps within a few months of the  
3 CloudConnect contract, from approximately  
4 January to April. And it would appear that the  
5 majority of the services rendered by  
6 CloudConnect exists roughly between 2012 and  
7 2016."

8 And he's talking about kind of the -- he  
9 does goes on -- or before to talk about the  
10 types of environments. And, actually, I'll  
11 read from this as best I can. Because, again,  
12 it is small.

13 "The three-month overlap in services could  
14 be explained by a change in access  
15 technologies, as it would appear to take some  
16 time to get people up to speed on how --  
17 official and new technology."

18 So I think he's talking about a potential  
19 transition of technologies here.

20 Q. And that was precisely what you were trying to  
21 explain at trial, but for which you didn't have  
22 any --

23 A. Yeah. Again, so I was never able to take a  
24 look at this environment, and so I can't say,  
25 one way or the other, what the exact purpose of

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1           these two different cloud environments were --  
2           whether one was replacing the other, or whether  
3           they were intended as services that would be  
4           kept in parallel, or what have you.

5           I just know that I think Mr. Gilpin and I  
6           both came to a similar conclusion that this  
7           might actually be a transition of services.  
8           And I think that speaks to just that it is a  
9           likely possibility. Instead of duplicative  
10          billing, it could just be transitional billing.

11       Q.   Now, when you were consulting with defense  
12           counsel prior to trial, did you advise them to  
13           get discovery from RSM, or United Way, or the  
14           Government regarding the basis of these  
15           opinions such as duplicative billing?

16       A.   Yeah. So I advised Counsel to make various  
17           discovery requests, searching, again, for more  
18           information about how some of these opinions  
19           were being rendered.

20       Q.   And was part of that because on paper, it  
21           didn't technically -- it wasn't -- when you  
22           read it, it wasn't technically correct, but you  
23           couldn't point to the source of the errors; is  
24           that --

25       A.   That's absolutely true. And so this is part of

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1       why when you're doing an accounting -- and,  
2       again, accounting -- forensic accounting is  
3       beyond my scope. That's why I rely on somebody  
4       like Mr. Kennedy, which I did during trial and  
5       whatnot, and why I'm sure Mr. Naviloff would  
6       rely on associates or whatnot.

7               When you're looking at technical services  
8       and the cost to deliver technical services or  
9       something like that, it's important to look at  
10      them through a technical lens. And what I mean  
11      by that is it's important to understand what  
12      the service really is, how it is used. And,  
13      so, yes, it's absolutely important that we look  
14      at this kind of through that technical lens.

15   Q.   And did you receive any documents that were  
16       responsive to this request to get the  
17       underlying technical analysis?

18   A.   No. No, we did not.

19   Q.   Before trial, I should say?

20   A.   Before trial, we did not.

21   Q.   And then after trial, did you, in fact, receive  
22       some of those documents?

23   A.   Yeah. So there were documents that were  
24       produced after trial, which I'd be happy to go  
25       through.

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1 Q. So before we get into the documents themselves,  
2 what did you find in your review of the  
3 posttrial discovery as to who was kind of  
4 behind providing these IT assessments  
5 underlying Mr. Naviloff's opinions?

6 A. Yeah. So we learned about Mr. Gilpin,  
7 primarily, and that he was the person doing --  
8 I would say, for lack of a better term -- the  
9 legwork of collecting and potentially  
10 analyzing -- kind of putting the -- offering  
11 the technical lens by which some of this data  
12 was presented. I know that these emails show  
13 that Mr. Naviloff was aware of this activity  
14 and his involvement.

15 Q. And have you reviewed Mr. Gilpin's  
16 credentials -- his qualifications?

17 A. I have.

18 Q. In your review of his qualifications, do you  
19 believe he is qualified to be providing IT  
20 expertise and analysis?

21 A. No. So while I would agree that the use of  
22 associates is absolutely a common business  
23 practice -- I use associates myself -- their  
24 work has to be closely monitored and -- closely  
25 and effectively monitored and reviewed by a

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1 knowledgeable technical expert to make sure  
2 that they're on the right track, providing good  
3 data.

4 Somebody who is in their second year, kind  
5 of recently promoted -- a sophomore associate,  
6 if you will -- is certainly not somebody that I  
7 would like to provide kind of a primary voice  
8 in providing technical expertise. I think that  
9 both his experience, time, and industry, and  
10 some of the analyses that he's provided here,  
11 show his inexperience and perhaps his unfitness  
12 as an expert.

13 Q. So let me ask you this.

14 You heard Mr. Naviloff just testified  
15 today; right?

16 A. I did.

17 Q. Now, he described what Mr. Gilpin was doing as,  
18 quote, "rather straightforward," and something  
19 that he would expect any first- or second-year  
20 associate to do -- this technical analysis that  
21 we're speaking of.

22 Do you agree with that?

23 A. I actually don't agree with that. I think that  
24 that really simplifies a complex equation in a  
25 way that I don't think is appropriate.

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1           These cloud environments are highly  
2 complicated. The technology, in kind of  
3 laymen's terms, is like a mattress; right?  
4 Excuse the example. You don't know what's  
5 inside of it; right? You can look at two  
6 mattresses and they look like the same thing,  
7 but one of them is super cheap, and one of them  
8 is expensive. And if you don't have a  
9 knowledgeable expert to tell you what's inside  
10 the mattress and how those parts go together,  
11 then your analysis of that is -- can be  
12 fundamentally flawed by that; right?

13           And so that is part of what I see the --  
14 my own role and the role of the IT experts in a  
15 case is to really illuminate some of the more  
16 complex subject matter, which I think  
17 Mr. Gilpin was ineffective in doing here.

18 Q. Now, Mr. Naviloff also noted that the buck  
19 stops with him, basically. That he was doing  
20 quality control. And I guess --

21           THE COURT: Mr. Eaton, let me interrupt  
22 you.

23           It's been 90 minutes. I want to give the  
24 reporter a break. So we will take 15 and  
25 reconvene at about 3:25.

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1 (Recess taken at 3:08 p.m., and the  
2 proceedings resumed at 3:25 p.m.)

3 THE COURT: Go ahead, AUSA Le.

4 MS. LE: Hi, Judge. Just two things.

5 Number one, I don't think we're going to  
6 get to Mr. Meyer today, considering the Court's  
7 scheduled discussion earlier.

8 So would it be okay if we release  
9 Mr. Meyer and he can still be under  
10 sequestration? This way he's not on for extra  
11 hours.

12 THE COURT: Yes.

13 MS. LE: Thank you. So we'll let him know  
14 that.

15 Charli, can you relay that information to  
16 him, please?

17 THE CLERK: I can, yes.

18 MS. LE: Thank you.

19 And, number two, Judge, we had originally  
20 planned this until about noon. I'm going to  
21 have childcare issues at about 4:00. I just  
22 wanted to apologize that my daughter might be  
23 coming home, and so I might ask for just a few  
24 minutes to get her situated, and then I'll be  
25 back on the screen, if that's okay as well.



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1 THE COURT: Of course.

2 MS. LE: Thank you.

3 THE COURT: All right.

4 Go ahead, Mr. Eaton.

5 MR. EATON: Thank you, Your Honor.

6 Tracy, can you pull us Exhibit Ff?

7 Q. (By Mr. Eaton) So, Mr. Sgro, we were just  
8 talking about Mr. Gilpin. And you were  
9 describing why IT expertise is necessary to --  
10 with regard to the IT assessments that underlie  
11 Mr. Naviloff's opinions.

12 Have you had a chance to review this  
13 email?

14 A. Yes, I have.

15 Q. And, actually, we've seen this email today as  
16 well. So can you zoom in on the first half of  
17 that email, just down to the RSM logo? Yes,  
18 that's good.

19 So what does this tell you in relation to  
20 the IT assessments that were performed in the  
21 process of calculating the categories of loss?

22 A. Yeah. I think, as was kind of discussed before  
23 too, this is an email from Chris Fitzgerald to  
24 Mr. Naviloff where they're talking about the  
25 potential -- or a calculation of downtime

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1 percentage -- 99.9 percent, and how many hours  
2 that would be.

3 And Mr. Fitzgerald raises a concern that  
4 the USAO, and I'll quote, "The USAO is relying  
5 solely on Ryan, who is only a newly promoted  
6 senior associate." And that Diego -- who I  
7 take to be Diego Rosenfeld, needs to testify,  
8 you want him to basically be aware -- agrees  
9 with and be aware of what's being presented to  
10 Counsel here.

11 And I think that both corroborates my  
12 concerns about Mr. Gilpin's fitness to do this  
13 unsupervised. It seems like, to some degree,  
14 it's possible that he is doing this in a way  
15 that at least Mr. Fitzgerald feels would  
16 require more involvement from Diego Rosenfeld.

17 Q. Okay.

18 And as you heard, Mr. Naviloff was  
19 discussing how he provides a quality control.  
20 These are his opinions. So even though he  
21 might take explanations from Mr. Gilpin, he's  
22 kind of vetting them to make sure they align  
23 with his opinions so that he can incorporate  
24 that.

25 Is that -- knowing Mr. Naviloff's

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1 qualifications and his areas or expertise, is  
2 that kind of a proper --

3 A. Yeah. So I find that to be problematic, only  
4 because, again -- to use my mattress analogy,  
5 which hopefully does not come back to haunt me  
6 in cross-examination -- but I know that  
7 Mr. Naviloff, by this email, is aware of  
8 Mr. Gilpin's involvement. I know that he's  
9 saying that these are his opinions, and he's  
10 the quality control person. However, you have  
11 to have the expertise to know what a good  
12 quality technical analysis or a poor quality  
13 technical analysis is in order to -- in order  
14 to be the quality control gate; right?

15 So this is why if I go into -- if I'm  
16 dealing with something in forensic accounting,  
17 I rely on an expert in that field, and I stay  
18 kind of within my scope of practice. I think  
19 it's important for all experts to kind of know  
20 where they begin and end, and not try to put  
21 their arms around too much. Because, contrary  
22 to the testimony I think we heard today by  
23 Mr. Naviloff, my opinion would be that some of  
24 this stuff is actually pretty hard to figure  
25 out.

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1           And Mr. Naviloff did say earlier in his  
2 testimony as I was listening that, perhaps  
3 during trial, I was suggesting that maybe some  
4 of this was just too hard to figure out. And  
5 that's not what I'm saying at all. I'm just  
6 saying that when you're analyzing this, you're  
7 analyzing technical services and technical  
8 contracts, and you need to have the voice of a  
9 technical expert to inform that opinion in  
10 order for those numbers to really be valid.

11           Because when you look at them just at a  
12 contract level, it is quite easy to make  
13 mistakes. It's not cut-and-dry. It can be  
14 complicated.

15 Q.   Okay. So with that, I'll turn to the third  
16 category of loss that you spoke about, and  
17 that's "services not rendered."

18           And, Tracy, if you could pull up  
19 Exhibit Oo and then go to page three of that  
20 exhibit. And can you zoom in on that "services  
21 not performed" paragraph?

22           Have you seen this document Mr. Sgro?

23 A.   I have.

24 Q.   And what does this tell you in terms of what  
25 we're discussing -- the technical assessment

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1 underlying this --

2 A. First of all, it lets me know that there is  
3 some kind of technical assessment happening,  
4 which -- and this document is produced after  
5 trial; that is correct?

6 Q. Yes.

7 A. Yeah, I believe I recognize this from the  
8 posttrial discovery.

9 This is where we learn that there is some  
10 technical discovery or analysis being done  
11 about -- by Mr. Gilpin, primarily. I'm  
12 inferring that from this. And that there's a  
13 document explaining this -- that it is their  
14 opinion that these services hadn't been  
15 performed.

16 Q. And you discussed that there was technical  
17 assessment going on.

18 I assume -- and I'd ask you to confirm --  
19 whether IT expertise is required to do this  
20 assessment.

21 A. There's a couple of things that are required.  
22 The first is, I absolutely -- in order to  
23 assess data management and high-availability  
24 backup storage, that is -- that definitely  
25 requires expertise in IT to assess. And there

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1 is an assessment kind of being done here, which  
2 means they're looking at an environment. And  
3 that's notable to me, because I was not  
4 permitted to look at any environments. I know  
5 environments outside of some desktop images and  
6 cellphone which were provided before trial.  
7 None of these environments were provided kind  
8 of for my analysis.

9 And so this is a case where -- I think I  
10 was concerned in reading this in two ways. The  
11 first was that there's an analysis perhaps  
12 being done here by a person that does not have  
13 the correct expertise to do so. And there's an  
14 environment to analyze that I really have no  
15 knowledge or visibility into. So this speaks  
16 to Mr. Gilpin having access to an environment  
17 that I don't have access to to perform any kind  
18 of analysis of my own.

19 Q. So we've been through the three categories, and  
20 you've discussed the lack of technical  
21 expertise underlying these opinions. But,  
22 well, let me ask you.

23 Have you reviewed Mr. Naviloff's  
24 declaration, which was attached to the  
25 Government's objection?

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1 A. I have.

2 Q. And in it, he states, quote, "My analysis is an  
3 accounts analysis. It is not an IT assessment,  
4 nor is my report an IT expert report." And he  
5 goes on to describe his experience in  
6 evaluation. He has, quote, "significant  
7 experience forensically evaluating business  
8 expenses and auditing financial statements,  
9 including capitalized assets such as IT  
10 equipment and software, as well as IT  
11 maintenance and depreciation expense."

12 So do you have a response to this? I  
13 mean, the suggestion is he's just doing an  
14 accounting analysis. IT doesn't play a role in  
15 it, so he doesn't need IT expertise.

16 What's your kind of response to that?

17 A. Yeah, so I think there's two things of note.

18 The first is that when he's asserting his  
19 familiarity with IT assets and software, he's  
20 speaking about capitalization and cost of --  
21 not familiarity with analyzing those services;  
22 right? So he's certainly, I'm sure, seen the  
23 cost of a computer or something before, and  
24 that's what he's talking about there.

25 But these -- an analysis of these

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1 contracts, in order to be correct, in order to  
2 be accurate, can't be separated from a  
3 technical analysis; right?

4 This goes back to the kind of SIP.US  
5 example, where you don't realize what you're  
6 looking -- without the technical analysis, you  
7 don't realize that you're looking at a very,  
8 very small component of a much bigger thing,  
9 and then saying "the cost of this was marked up  
10 to the cost of this." And Mr. Meyer, in his  
11 testimony during trial, which I was present  
12 for, even said for just -- let's use the  
13 telephony example for telephones. He charges a  
14 flat fee per month per line; right? And  
15 forgive me -- I don't have the number, but it's  
16 \$50, \$60, \$70 a month per line -- something  
17 like that.

18 And then during this analysis -- or during  
19 Mr. Naviloff's analysis and in his opinion, he  
20 says, "Oh, the cost is only the SIP.US piece";  
21 right? And so it's like, wait a minute.  
22 You're an accountant. You can't have it both  
23 ways. It's very strange.

24 And I actually gave, in my latest  
25 report -- my supplementary report -- an example



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1       that I think speaks to why you can't have the  
2       -- a proper financial analysis of technical  
3       services without technical expertise or someone  
4       with technical expertise informing you.

5               And I gave kind of a fictitious example of  
6       if I sell you a car for \$25,000, and before  
7       that I buy \$1,000 worth of tires -- and maybe a  
8       person analyzing the \$25,000 and the \$1,000  
9       invoice says, "Oh, well, you only paid \$1,000  
10      for the car, and then marked it up to \$25,000,"  
11      when, in fact, that's not true.

12             I'm only talking about a piece of that --  
13      a very small piece of that. And so that  
14      technical analysis really allows you to make  
15      informed decisions about what these contracts  
16      actually mean.

17   Q.      Now, we've -- as you've stated, your original  
18      testimony at trial indicated that there were  
19      errors in the analysis.

20             Now, with this post-discovery trial, as  
21      you mentioned, you know the source of those  
22      errors in terms of Mr. Gilpin and the  
23      inadequate IT assessments?

24             THE COURT: Mr. Eaton, he's your witness.  
25      Why don't you not lead him, and why don't you

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1           conduct direct and open-ended questions?

2           MR. EATON: Okay. Sure.

3       Q.    (By Mr. Eaton) So let me ask you this.

4           Why does it matter to you to be able to  
5       point to the source of IT errors?

6       A.    Yeah, so I think there's a couple of reasons  
7       that some of this posttrial discovery is  
8       important to my analysis, and I'll try to scope  
9       myself there.

10           The first is that we saw the scan data;  
11       right -- the technical scans that were provided  
12       posttrial that were not provided pretrial, that  
13       clearly show some analysis of the environment  
14       being done, and there being an environment to  
15       do an analysis of, which I was not provided  
16       access to. I was not provided that scan data.  
17       And so that really inhibits my ability to  
18       inform my own opinion and to inform Counsel  
19       about potential examination of expert  
20       witnesses, because the one side has access to  
21       things that the other side doesn't have access  
22       to; right? So that's the first problem.

23           The second problem is -- what I can see  
24       now is there's a reason -- and, again, I did,  
25       as you correctly said -- I did, at trial, point

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1 out many of the issues that I felt were issues  
2 with Mr. Naviloff's opinion. Now I can see a  
3 lot of those issues are of the result of these  
4 other associates or people we didn't really  
5 know about before trial giving him an incorrect  
6 or potentially flawed technical analysis. To  
7 what degree he incorporates that or doesn't  
8 incorporate that, I can't speculate as to the  
9 intention of Mr. Naviloff. But I can say that  
10 that appears to me to be part of why some of  
11 these kinds of errors are made.

12 Q. You obviously just listened to Mr. Naviloff's  
13 testimony today.

14 Other than Mr. Gilpin, did he point to any  
15 other person that he gained assistance from in  
16 terms of understanding IT issues?

17 A. Yeah. He referenced Mr. Meyer, which is the  
18 same as he referenced kind of at trial.

19 Q. Have you reviewed Mr. Meyer's --

20 A. I have, yeah.

21 Q. -- qualifications?

22 THE COURT REPORTER: Excuse me. This is  
23 the court reporter.

24 Can I please ask the witness to wait until  
25 the attorney finishes his question before

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1           answering?

2           THE WITNESS: Oh, I'm sorry.

3           THE COURT REPORTER: Thank you so much.

4           MR. EATON: So, Tracy, can you pull up  
5           Exhibit H?

6           (Pre-marked Defendant's Exhibit H  
7           introduced.)

8       Q.    (By Mr. Eaton) So have you reviewed this?

9       A.    Yes, I have.

10      Q.    Okay.

11           So in your opinion, and in reviewing this  
12           document, is Mr. Meyer qualified to provide IT  
13           advice for assessment?

14      A.    So Mr. Meyer is, I think, clearly by the --  
15           objectively by this, not an IT expert, has very  
16           little technical experience himself, especially  
17           at engineering or understanding modern  
18           technologies. His resume and experience as a  
19           technical director and things predates all of  
20           the technology that we are talking about today.  
21           And I believe that's probably why he wasn't  
22           entered as an expert at trial as well. That's  
23           my speculation.

24           MR. EATON: So let's go to another  
25           posttrial discovery document. This is

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1 Exhibit Rr.

2 Tracy, if you could pull that up.

3 (Pre-marked Defendant's Exhibit Rr  
4 introduced.)

5 Q. (By Mr. Eaton) Mr. Sgro, have you reviewed  
6 this particular email?

7 A. I have.

8 Q. And what does this email tell you?

9 A. So would you mind blowing up part of it? I  
10 apologize. My eyes aren't what they used to  
11 be.

12 Q. Is the middle part what you're looking at?

13 A. Yeah, I'm looking at the part saying "Chris."  
14 Yeah, perfect. Thank you so much. Yeah. So  
15 this is from Sean Renshaw to Chris Fitzgerald  
16 and Mr. Naviloff, as well as others.

17 He's saying, "We will need to coordinate  
18 getting copies of the DMs, as well as the Gmail  
19 he has preserved and any logs. I believe Ryan  
20 might be able to assist with that."

21 This is in reference to either virtual  
22 machines or voicemails, whichever one "DM"  
23 stands for, which would be -- both contain data  
24 that would be part of my analysis. As well as  
25 Gmail -- he had preserved -- Gmail is where

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1 Mr. Alrai's emails would have been stored and  
2 preserved.

3 Q. And would it have been important for you to  
4 have this information prior to trial?

5 A. Yeah. So, many times, I asked -- I advised  
6 Counsel to request the communications -- email  
7 communications and environments in question,  
8 especially the emails from Mr. Alrai. And what  
9 we received was a smattering of kind of  
10 cherry-picked emails.

11 What we do learn from this, as well as we  
12 learned during trial from Mr. Meyer, that he  
13 did preserve the totality of Mr. Alrai's  
14 emails, and those weren't provided to us. Why  
15 that's important is because we're talking about  
16 millions of dollars in IT services.

17 When we're evaluating whether or not  
18 services were provided, or maybe they were  
19 duplicative, or there was billing that was in  
20 excess of their value, one of the ways that we  
21 do that is to look at the environments  
22 themselves. And I fully realize that that's  
23 not always possible.

24 So when that's not always possible, the  
25 other thing we rely on heavily is

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1           communications, especially by executive leaders  
2           in the company. So being able to review those  
3           emails and provide my own review of those  
4           emails would have been highly beneficial in  
5           informing my own opinion of kind of the facts  
6           of the case here.

7       Q.   And just to be clear, were these produced --  
8           these emails that you're talking about -- were  
9           these produced prior to trial?

10      A.   No, they were not.

11      Q.   Were the help desk communications?

12      A.   Yes. And so the help desk communications are  
13           another place where I asked for -- help desk in  
14           a company is very often the kind of  
15           communication traffic cop of the organization.  
16           All of the problems and resolutions come in and  
17           out of there. And so that's another place,  
18           when you're talking about technical services,  
19           that you can look and learn a lot about the  
20           actual services -- what they look like,  
21           problems with them, engineering work that is  
22           being delivered in support of them. And that  
23           was not being provided at all, although it was  
24           requested, by Counsel.

25      Q.   You indicated that Mr. Alrai's emails -- that

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1 Mr. Meyer had indicated Mr. Alrai's emails were  
2 preserved.

3 Did you have any indication that the help  
4 desk communications were preserved prior to  
5 trial?

6 A. Yeah. Well, so at trial we learned that the  
7 help desk -- I believe, if my recollection is  
8 correct, we learned that the help desk was  
9 preserved as well.

10 Q. Mr. Meyer also testified that with regard to  
11 the emails and help desk communications, quote,  
12 "We provided RSM access. They took the image  
13 with their own imaging tools." He also said  
14 that they were forensically looked at by RSM.

15 So what does that tell you about the  
16 access that RSM had to these documents that you  
17 had requested prior to trial?

18 A. This is similar to the issue with duplicative  
19 billing and the cloud environments. It appears  
20 that engineers, or people who are associates,  
21 or whomever at RSM had access to these  
22 environments, whether forensic copies of these  
23 environments, or access to the environments in  
24 order to perform scanning -- those sorts of  
25 things.



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1           So it seems to me that RSM had access to  
2       view this and make assessments that we did not  
3       have.

4       Q.   Now, do you recall your cross-examination at  
5       trial?

6       A.   Yes.

7       Q.   Maybe not every word of it, but --

8       A.   Yes.

9       Q.   Do you recall that one of the first questions  
10      you got on cross-examination was whether  
11      Mr. Meyer was in a better position to evaluate  
12      the system that he inherited from DigitalNet  
13      and Mr. Alrai than you were?

14      A.   I do remember that question, yes.

15      Q.   And do you recall that your response was  
16      basically "yes, because I didn't get to see the  
17      service"?

18      A.   Yeah, so -- and I'll clarify that, if that's  
19      helpful.

20           What we have here is Mr. Meyer has access  
21      to these environments, and has, in many cases,  
22      provided access to these environments to RSM.  
23      But he doesn't have the expertise in order to  
24      evaluate these environments; right? I, on the  
25      other hand, am the only IT expert or technical

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1 expert that I'm aware of on the case. I have  
2 the expertise to evaluate the environments;  
3 however, I didn't have the access to.

4 So we were in a little bit of a stalemate  
5 there as to who was in a better position. The  
6 answer is, certainly, Mr. Meyer had the access  
7 to the environment that I did not to view what  
8 it was. But he simply does not also have the  
9 expertise in which to analyze that environment.

10 MR. EATON: Let's go to Exhibit Tt.

11 (Pre-marked Defendant's Exhibit Tt  
12 introduced.

13 MR. EATON: And can you zoom in on that  
14 middle email exchange? Yeah. Okay.

15 Q. (By Mr. Eaton) So this is another posttrial  
16 discovery email.

17 Have you reviewed this?

18 A. I have.

19 Q. And what does this email tell you?

20 A. This is essentially the senior associate,  
21 Mr. Gilpin, at RSM, conversing with a person by  
22 the name of Mike Sack in Boston who works for  
23 Microsoft on the licensing model and the amount  
24 of license servers and products at the  
25 United Way. So, essentially, they are

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1 performing an analysis of whether or not  
2 Microsoft products were paid for.

3 Q. Okay.

4 Do you recall whether Mr. Meyer testified  
5 at trial as to whether Mr. Alrai had allowed  
6 the Microsoft products at United Way to go  
7 unlicensed?

8 A. I do. I believe -- and this is by  
9 recollection, so forgive me on accuracy.

10 I believe he said something to the effect  
11 of there were many things that were on trial  
12 versions or were unlicensed in the environment.

13 Q. And does this email indicate anything about the  
14 accuracy of that claim?

15 A. Yeah, so this is a person, presumably, that  
16 works for Microsoft actually saying that  
17 there's no issue with the ownership; that there  
18 are licenses that have been paid for. And it  
19 also means that Mr. Gilpin and -- or by way of  
20 or in conjunction with Mike Sack are analyzing  
21 this environment, and, I believe, produced a  
22 report to this effect.

23 Q. I'd like to go back to the IT environment  
24 issue. You had spoken about how you requested  
25 it before trial.

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1           In your review of the Government's  
2           objection, do you recall the Government arguing  
3           anything about the IT environment -- the term  
4           "IT environment" being unclear?

5       A.    Yeah. I recall reading something to the effect  
6           of that they didn't understand what the IT  
7           environment was in the context we were asking  
8           about it.

9       Q.    And what is your response to that?

10      A.    So, I mean, the term "IT environment" is fairly  
11           well known throughout the industry. I mean, an  
12           IT environment being the technical environment  
13           that's been analyzed -- or being spoken about,  
14           sorry -- not necessarily analyzed -- by  
15           Mr. Naviloff.

16           The cloud environments, the VPN  
17           environments, the data backup -- those are all  
18           examples of IT environments. And I'm not sure  
19           what the confusion is there. That seems to be  
20           something that's talked about fairly often. So  
21           in their objection, I'm not clear as to what is  
22           unclear about that.

23      Q.    Mr. Meyer at trial described the IT environment  
24           as a "road map of what your network looks like.  
25           It will give you a map of what's connected to

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1           what within your systems." Does that -- let me  
2           ask.

3                     Is that a generally accurate idea of what  
4           an IT environment is?

5       A.    Yeah. I would say that those documents would  
6           describe an IT environment accurately. That's  
7           obviously not a comprehensive list, but I would  
8           agree with that, generally.

9       Q.    And do you also recall in reviewing the  
10           Government's objection an argument about how  
11           preserving the IT environment would be overly  
12           burdensome or disruptive?

13   A.    I do.

14   Q.    Let me ask you.

15                     Would preservation of an IT environment --  
16           would that disrupt the operations of United Way  
17           or prevent a company such as Mr. Meyer's from  
18           enacting any necessary remedial measures?

19   A.    Yes. To the -- the short answer is no, I don't  
20           believe that that would be burdensome. The  
21           reason for that is I think in clear cases, the  
22           IT environments were preserved at least long  
23           enough for RSM to perform an evaluation of  
24           certain environments. So in that case, it  
25           wasn't burdensome.

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1           In general terms, IT systems are usually  
2 backed up, and maybe nightly or whatever. And  
3 those backups could be easily used to  
4 reconstitute an environment to a point in time  
5 where it would not be at all burdensome to the  
6 ongoing environment, or production, or the  
7 business of the United Way.

8           So I think it's fairly common practice to  
9 preserve your environments on an ongoing basis,  
10 and safeguard it against things like accidental  
11 damage, deletion, viruses, all of that. We  
12 could have easily taken a look at that kind of  
13 stuff in order to make an assessment of the  
14 environment.

15           THE COURT: Can I interrupt here?

16           MR. EATON: Sure.

17           THE COURT: Mr. Eaton or Ms. Brown can  
18 answer this question, because I don't know how  
19 much time I want to spend listening to the IT  
20 environment line.

21           Look, I know there was an IT environment  
22 sort of litigation freeze requested by McLane  
23 law firm early in the situation, and it doesn't  
24 appear to have been honored. Maybe  
25 Mr. Commisso or the prosecution disputes that,

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1 but the allegation is it wasn't honored.

2 But for me to attribute that to the  
3 prosecution in this case, I have to basically  
4 buy into the attribution theory, right, that  
5 Mr. Commisso was part of the prosecution team  
6 and that he somehow failed to make this happen.

7 Otherwise, I can't really tag that to the  
8 prosecution; right?

9 MS. BROWN: Can I just insert, Your Honor?

10 I think one of the things -- going back to  
11 our motion, one of the factual things you put  
12 in there is that Attorney Commisso, and at  
13 least Attorney Davis, were talking in this case  
14 and collaborating in this case weeks before  
15 Mr. Alrai was even arrested. And in that  
16 time -- I think it was shortly after he was  
17 arrested that the preservation letter went out.

18 And part of that is that Attorney Commisso  
19 was on notice as to preservation during a  
20 period of time when he was consulting with the  
21 Government about production of documents. I  
22 think he even got the grand jury subpoena  
23 June 4. So it's all in the same period of time  
24 that Attorney Commisso is handing over  
25 documents to the Government -- and, we believe,

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1 without asserting privilege, or at least moving  
2 to quash, or anything along those lines -- at  
3 the same time that he knows that the Defendant  
4 is asking to preserve.

5 So I think it's more than that, because of  
6 the closeness of -- and we've heard more of  
7 that from Mr. Naviloff today --

8 THE COURT: Okay. So --

9 MS. BROWN: -- but most of the facts  
10 you're looking for are in our motion.

11 THE COURT: I know. I know they're in the  
12 motion. But I'm not looking for the facts.  
13 I'm looking for the argument.

14 MS. BROWN: Yeah, that's the argument.

15 THE COURT: But I think you've answered  
16 me. Because your point is, I don't necessarily  
17 have to buy into the attribution theory,  
18 because of the temporal closeness and the  
19 actual connections between Mr. Commisso and the  
20 prosecutors during this time.

21 MS. BROWN: Correct.

22 THE COURT: Okay.

23 Go ahead, Mr. Eaton.

24 Q. (By Mr. Eaton) Thank you. I really just have  
25 one more question on -- well, just one more



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1 question.

2 Which was, do any of the new discovery  
3 emails that you've reviewed -- does that  
4 indicate that there were, in fact, aspects of  
5 the environment that were preserved, but not  
6 handed over to you?

7 A. Yeah. So it appears that any of the  
8 environments that were -- that Mr. Gilpin or  
9 somebody else was doing scanning from RSM on --  
10 those environments have to exist in order to  
11 perform scanning. That is logical. I have not  
12 been able to see those environments. Nor, in  
13 all cases, did I see the scans. We saw two  
14 scans or so before trial, or as part of  
15 pretrial discovery. We have found others  
16 afterwards. There was more scanning done which  
17 we didn't have. So that certainly impacts my  
18 ability to analyze that environment and inform  
19 my opinion.

20 Also, a lot of these emails shows those  
21 underpinnings, as we've discussed kind of at  
22 length today, where these emails and these  
23 conversations that are being had are talking  
24 about analyses that are being done that we're  
25 not privy to. And so I can't comment on them.

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1 I can't look at the validity of them. And I  
2 can't inform Counsel as to how to examine those  
3 witnesses properly.

4 MR. EATON: Thank you.

5 I don't have any further questions.

6 THE COURT: Who is conducting the  
7 cross-examination?

8 MS. LE: I am, Your Honor.

9 THE COURT: Please proceed.

10 MS. LE: Thank you, Your Honor.

11

12 CROSS-EXAMINATION

13 BY MS. LE:

14 Q. Good afternoon, Mr. Sgro.

15 A. Good afternoon, Counselor.

16 Q. You've been working with the Defendant and his  
17 attorney since before trial; is that right?

18 A. That's correct.

19 Q. When were you retained to begin with?

20 A. I believe sometime in August of '19. You can  
21 fact-check me, but that is the rough area.

22 Q. And, sir, am I right that you were retained to  
23 provide technical analysis and expert opinions?

24 A. That is correct.

25 Q. And as part of your services to the Defendant

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1 in preparation for his trial, did you have  
2 access to DigitalNet's business records?

3 A. Their business records -- how do you mean,  
4 "business records"?

5 Q. So most businesses maintain records, right, of  
6 the services they provide, the bills that they  
7 pay, the bills they send out to their clients;  
8 is that correct?

9 A. Yeah. So I was made aware of invoices and  
10 contracts of that nature, yeah, absolutely.

11 Q. So what business records related to DigitalNet  
12 did you review?

13 A. So I got to see IT contracts -- or contracts  
14 for IT and technical services. I got to see  
15 invoices for those services. And I don't  
16 recall much else.

17 Q. Okay.

18 So were those records that you just  
19 testified about records that were obtained  
20 through discovery from the United States  
21 Attorney's Office?

22 A. They were given to me by defense counsel.

23 Q. So are you able, after your extensive review  
24 and preparation for these hearings and your  
25 guidance to counsel, able to determine what

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1 records you reviewed came from DigitalNet and  
2 your client versus records that were produced  
3 through the criminal discovery process from the  
4 Government?

5 A. I do not believe I am able to deduce the origin  
6 of the finding of those documents. Those  
7 documents all came to me from defense counsel.

8 Q. So in the course of your analysis -- I think  
9 you've used that term sometimes -- did you ever  
10 ask for additional records that perhaps  
11 DigitalNet would have to kind of supplement  
12 what was produced from United Way and other  
13 sources?

14 A. I've never made any requests to DigitalNet.

15 Q. Why not?

16 A. I was brought on to offer technical analysis of  
17 the environments, and made requests through --  
18 or advised counsel about the types of  
19 information about those environments that would  
20 be helpful to my analysis.

21 Q. And based on your understanding of the evidence  
22 that was presented at trial -- and here I have  
23 to correct myself, Judge. I think the trial  
24 was nine days and not seven -- but you know  
25 that DigitalNet was essentially Imran Alrai,

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1 right, and it was his business; do you  
2 understand that?

3 A. That's beyond the scope of my practice as a  
4 technical expert, but that is what I've -- I  
5 mean, that is -- if that is what you are  
6 saying.

7 Q. Well, you've reviewed trial transcripts; right?

8 A. I have, yes.

9 Q. And the trial evidence has established that  
10 Imran Alrai was DigitalNet; is that right?

11 A. If the transcripts say that, yes.

12 Q. And you'll accept from me that the other  
13 company that was involved was the  
14 AISA Consulting, which is another business  
15 entity run and controlled by Imran Alrai; will  
16 you accept that?

17 A. Yes.

18 Q. So did you conduct an independent analysis of  
19 DigitalNet's expenditures for IT services to  
20 United Way of Massachusetts Bay?

21 A. Of IT expenditures on behalf of those  
22 companies?

23 Q. Yes, that DigitalNet provided to United Way.

24 A. No.

25 Q. Why not?

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1 A. That's beyond -- so the -- a financial analysis  
2 of that type is generally beyond my scope of  
3 practice.

4 Q. Are you aware -- I understand that you  
5 confirmed with Mr. Kennedy, who was the  
6 Defendant's accounting expert; right?

7 A. That is correct. I helped inform him of  
8 certain technical findings.

9 Q. And he -- actually, you reference his  
10 conversation with you; is that right?

11 A. That's correct.

12 Q. And so let's start out with that.

13 What kind of technical advice did you give  
14 to Mr. Kennedy for his testimony about the loss  
15 calculations in this case?

16 A. So, many of the questions that were asked to me  
17 by Mr. Kennedy were of the nature -- explaining  
18 what certain technical services were. He's not  
19 a technical expert.

20 Q. And can you be more specific?

21 A. I don't recall very specifically, but they were  
22 generally an explanation of services -- service  
23 types, what types of technology services do --  
24 that sort of discussion.

25 Q. Do you know whether your communications with

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1 him that informed his opinion were documented  
2 in any way?

3 A. I do not know.

4 Q. And were these verbal communications, or were  
5 they written communications?

6 A. Generally, my communications are written.  
7 Certainly, there were phone calls between  
8 myself, Mr. Kennedy, and Attorney Harrington.

9 Q. And you were also present for Mr. Kennedy's  
10 testimony at trial; is that right?

11 A. That is correct.

12 Q. And you testified right after Mr. Kennedy; is  
13 that correct?

14 A. I believe that's true.

15 Q. And I understand that Mr. Kennedy testified  
16 that Mr. Naviloff's loss calculations were  
17 overstated; is that a fair assessment of his  
18 general opinion?

19 A. I believe that is Mr. Kennedy's opinion, yes.

20 Q. But he, himself, offered no separate loss  
21 calculation; is that correct?

22 A. I believe that is correct.

23 Q. Is it correct that Mr. Kennedy relied upon  
24 Mr. Alrai's tax return as true statements of  
25 his supposed expenses and income; is that

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1 right?

2 A. I suppose so. I'm a little hazy on exactly  
3 what he would have put inside of his financial  
4 analysis. Again, that's well beyond the scope  
5 of my practice.

6 Q. Did you review his financial analysis?

7 A. I read it, yes.

8 Q. Okay.

9 And did you have any opinions about his  
10 analysis?

11 A. I -- no.

12 Q. And I believe that in his report, he's offering  
13 some guidance that you gave him about why  
14 Mr. Naviloff's review could be incomplete; is  
15 that right?

16 A. Yeah, that sounds right.

17 Q. Did you, at any time, suggest to Mr. Kennedy  
18 that he could review DigitalNet's business  
19 records to make a determination about what  
20 services were actually provided by DigitalNet  
21 to United Way?

22 A. I don't believe I advised Mr. Kennedy on the  
23 methods of forensic accounting, no. That's  
24 beyond the scope of my practice.

25 Q. And here I'm going to make reference to



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1 Mr. Kennedy's trial testimony, which is that  
2 ECF number 109, starting at page 123 to 124.  
3 And if you recall this testimony -- I'll read  
4 it to you -- regarding Mr. Kennedy's view of  
5 invoices -- of DigitalNet's invoices to United  
6 Way.

7 And he said, and I quote, "I did some  
8 level of review, although to Mr. Naviloff's  
9 credit, he seemed to have been very thorough  
10 relative to his review of the invoices and the  
11 disbursement. And after some rapid cursory  
12 review, I determined that there really wasn't a  
13 need to replicate that information and I relied  
14 on the amounts actually paid."

15 Does that comport with your recollection  
16 of the testimony about why he did not conduct a  
17 separate analysis of invoices?

18 A. Yes. If that's what the transcript says, yes,  
19 absolutely.

20 Q. Will you agree with me that United Way -- I'm  
21 sorry.

22 Would you agree with me that your client,  
23 Imran Alrai, would be in the best position to  
24 know what his business's expenses were and  
25 direct costs were for IT services provided to

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1 United Way?

2 A. Yeah, perhaps.

3 Q. And if he was conducting a legitimate business  
4 and provided legitimate services, his company  
5 would be expected to have business records for  
6 those services; am I right?

7 A. Again, under normal circumstances, I think  
8 businesses have records generally; but, again,  
9 you're well outside of the scope of my  
10 technical practice there.

11 Q. And were you provided with any records or  
12 corroborating information from your client  
13 regarding the actual services he provided to  
14 the United Way?

15 A. Can you ask that again?

16 Q. Sure.

17 Were you provided with any records or  
18 corroborating information by your client to  
19 establish what services he actually provided to  
20 United Way through his company, DigitalNet?

21 Is that more clear?

22 A. Yeah.

23 No, I don't believe so. Not directly from  
24 Mr. Alrai.

25 Q. So you never saw any records about

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1 subcontractor costs; is that right?

2 A. Subcontractor -- what? I apologize.

3 Q. Any subcontractors costs that he might have  
4 incurred in providing services to United Way?

5 A. I don't believe so, but, again, this is kind of  
6 within the financial analysis, which is outside  
7 of what my report covers.

8 Q. Do you remember your initial report -- expert  
9 report that you provided right before trial?

10 Do you remember that report?

11 A. I do.

12 Q. And I think it's actually attached as Exhibit G  
13 to Defendant's surreply or response.

14 Do you remember that?

15 A. Yes.

16 Q. Now, do you remember making some assessments  
17 about services that were provided by DigitalNet  
18 to United Way through Pakistan-based employees?

19 A. So there is -- yeah, part of the discussion of  
20 DigitalNet is that they have employees in  
21 Pakistan.

22 Q. Right.

23 And I think if you -- do you have your  
24 report in front of you, sir?

25 A. I do not, but I'd be happy to review it with

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1           you.

2       Q.    And do you want me just to read it to you, or  
3           do you want to pull it up on your computer  
4           screen?

5       A.    I'm happy to do either.

6       Q.    Okay. Look at page six of your report,  
7           paragraph 26; okay.

8                        "In addition to being certified by major  
9           vendors and professional organizations Cisco,  
10          Microsoft, and Project Management Institute,  
11          PMI, the DM" -- and I assume that's  
12          "DigitalNet" -- "in Pakistan have significant  
13          capabilities in the areas of infrastructure,  
14          networking, software development, and desktop  
15          support consistent with the skills required to  
16          fulfill the requirements of the contract  
17          awarded to DN by UWMB through the RFP process."

18                       Do you remember that statement that you  
19          made?

20       A.    You are reading, yes.

21                       THE COURT: Hold on a minute. Couple  
22          steps at a time.

23                       Were you able to attend to your childcare  
24          issue?

25                       MS. LE: Yes, Your Honor. She just came

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1 in and took care of herself.

2 THE COURT: Mr. Sgro, you don't have your  
3 report with you?

4 THE WITNESS: I don't have it in front of  
5 me right now. I can pull a copy up of it, or  
6 we can look at it together.

7 THE COURT: Well, yeah.

8 Only because your audio is a little bit  
9 tough, AUSA Le.

10 MS. LE: Oh, I'm sorry.

11 THE COURT: It's a little bit -- and I'm  
12 sure the reporter is struggling, and maybe the  
13 witness too.

14 When you say you can pull it up, does that  
15 mean that you can get it off a printer, or that  
16 you have it right handy, Mr. Sgro?

17 THE WITNESS: I could get it out of our  
18 files. I can log into our server and get it.

19 THE COURT: Let's just put it up on the  
20 screen.

21 MS. BROWN: Isn't it in our exhibits,  
22 Mike?

23 MS. LE: Yes. It's Exhibit G.

24 THE WITNESS: Perfect.

25 MS. LE: But I'm not sure that -- was that

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1 part of the exhibits that you sent, Donna?

2 MS. BROWN: His most recent exhibit was  
3 what was included in what we gave yesterday. I  
4 don't know -- I think we had his original  
5 exhibit too, didn't we? Or -- I can't  
6 remember.

7 MR. EATON: No. For this hearing, we only  
8 have his supplemental report. His original  
9 report is not already an exhibit.

10 MS. BROWN: I do think it's a document,  
11 though, wasn't it, in our reply motion, maybe?

12 MR. EATON: Yeah, yeah. It's been --

13 MS. BROWN: Might have been, like, F, or  
14 G, or something like that, in our reply motion.

15 MS. LE: I mean, I could tell the Court  
16 I'm reading it.

17 MS. UHRIN: This is Tracy. If somebody  
18 wants to just email me the document, I can put  
19 it up on the screen.

20 THE COURT: Well, is that going to happen?

21 Neha, do we have it?

22 MS. DEWAN: Yeah. I'm emailing it to  
23 Tracy right now. Just sent it. It should be  
24 in your email box now.

25 Q. (By Ms. Le) And, Tracy, if you can go to page

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1 six, paragraph 26.

2 Mr. Sgro, can you see that?

3 A. Yes, I can.

4 Q. I'll let you read it.

5 A. Thank you. Sorry about that.

6 Q. Where did you get this information that's in  
7 paragraph 26?

8 A. So there's a bunch of places that this  
9 information was pulled from. The first was --  
10 there is -- and I'm trying to recall. There  
11 was interviews or testimony with people that  
12 worked for DigitalNet, but were U.S.-resident.  
13 There was information that was provided about  
14 the marketing and capabilities of DigitalNet  
15 that was provided to me by Counsel, as well as  
16 an overview of some of the skills and  
17 capabilities that were there.

18 Q. But what specific records or independent  
19 confirmation did you have to make this  
20 particular statement in your expert report?

21 A. So I didn't do an independent analysis to  
22 actually call these vendors or anything like  
23 that, to find out if they were -- if these  
24 certifications or these professional  
25 organization assessments are true. We relied

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1 on the documents that were provided by Counsel.

2 Q. And you know Mr. Naviloff's report -- fairly  
3 detailed; right?

4 A. Quite extensive, yes.

5 Q. And when he made a certain assessment, he  
6 actually cited, by Bates number, the source of  
7 his information; is that correct?

8 A. Yes, I believe in general, that is correct.

9 Q. Is it not common practice for you to do  
10 something so that we can go back and pinpoint  
11 where you got the source of the information  
12 from?

13 A. In general it is, and I think we've done that  
14 in other places in the report as well. I'm not  
15 sure why that's not the case here.

16 MS. LE: Let's go -- thank you, Tracy.  
17 You can close out that particular screen.

18 Can you highlight paragraph 27?

19 Q. (By Ms. Le) Can you read that to yourself,  
20 sir?

21 A. You would like me to read it out loud?

22 Q. No, just to yourself.

23 A. Yes, I've read it.

24 Q. So what does this tell us in kind of laymen's  
25 terms?



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1 A. Yeah, so in laymen's terms, my understanding of  
2 the DigitalNet entity was that it uses or it  
3 leverages what I would call an  
4 industry-standard offshoring model.

5 And by "industry-standard offshoring  
6 model," I simply mean the use of engineers in  
7 less expensive regions in order to pass --  
8 regions of the world that have potentially  
9 lower salaries for those technical positions to  
10 pass savings to client companies. That is a  
11 very typical model for any company operating  
12 offshore, because Massachusetts is a very  
13 expensive market for technology --  
14 technologists.

15 Q. So specifically as it relates to this case, are  
16 you referring to DigitalNet's operations in  
17 Pakistan?

18 A. I'm speaking in this case about my  
19 understanding of the model that DigitalNet is  
20 operating in.

21 Q. And specifically, other than some kind of  
22 operations in Pakistan, where else was  
23 DigitalNet subcontracting to work for  
24 United Way?

25 A. Subcontracting its work for the United Way?

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1 Q. Yeah, because it sounds like they subcontracted  
2 services in less expensive parts of the world.  
3 The evidence at trial was that DigitalNet had  
4 at least some component in Pakistan.

5 So where else was there services that were  
6 rendered to the benefit of United Way --

7 A. So my understanding of DigitalNet is that it  
8 operated in Pakistan as an entity in Pakistan,  
9 as well as having employees embedded or  
10 adjacent to the United Way in Massachusetts.

11 Q. Right.

12 A. Yes, that's correct. Correct.

13 Q. And there's also a gentleman named Kal  
14 (phonetic) --?

15 A. That is correct.

16 Q. And he sometimes lived abroad; sometimes in  
17 Massachusetts; is that right?

18 A. Reportedly, yes.

19 Q. So can we agree, here you're probably talking  
20 about Pakistan; right?

21 A. Oh, in terms of that being an area of the world  
22 that would fit this description, yes.

23 Q. Are you aware of any other areas of the world  
24 that would fit this description in your expert  
25 report?

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1 A. I am aware of other areas of the world that  
2 would fit this description, but not where I  
3 know that DigitalNet operates.

4 Q. Just so we're clear, I only mean with relation  
5 to DigitalNet's operations with all of my  
6 questions; okay?

7 A. Fair.

8 MS. LE: So let's go to paragraph 29, if  
9 we can, please, Tracy.

10 Q. (By Ms. Le) In here you said, "I find no  
11 evidence of duplicative billing or excessive  
12 billing based on my review of the RSM report,  
13 the services provided by DN or its  
14 subcontractors"; right?

15 A. Not -- I just apologize. You read that  
16 incorrectly.

17 Q. Oh, I did? I'm sorry.

18 A. "I find no evidence of duplicative billing or  
19 excessive billing based on my review of the RSM  
20 report, services provided by DN or its  
21 subcontractors." So that refers to my review  
22 of Mr. Naviloff's opinion, the RSM report, and  
23 my review of the documents -- the data provided  
24 by -- about the services for which DigitalNet  
25 invoiced the United Way. That's correct.

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1 Q. But it also has "or its subcontractors"; do you  
2 see that word?

3 A. I do see "or its subcontractors."

4 Q. So are you aware of any additional records  
5 relating to subcontractors that were employed  
6 or used by DigitalNet for services rendered to  
7 the United Way?

8 A. I don't believe so.

9 Q. So you don't have any additional invoices?

10 A. I don't believe I'm in receipt of any invoices  
11 that are not known to everyone, no.

12 Q. Did you conduct any independent analysis of  
13 DigitalNet's spending in Pakistan?

14 A. Don't do an analysis of any spending. That's  
15 outside of my scope of practice.

16 Q. Did you or anyone who was under you at your  
17 business request any documentation or records  
18 related to any expenses incurred by DigitalNet  
19 in Pakistan related to United Way?

20 A. So the expense calculation was something that I  
21 talked to Mr. Kennedy about and was within his  
22 scope.

23 Q. Okay.

24 So it's something that you talked about  
25 with Mr. Kennedy?

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1 A. Sure, yeah.

2 Q. And would that have been helpful and important  
3 to you of Mr. Kennedy to rebut Mr. Naviloff's  
4 testimony regarding loss calculations?

5 A. It -- sure, there's certainly -- so in a normal  
6 -- sorry, didn't mean to say "normal."

7 In the case of performing an analysis of  
8 the services and any evaluation of the -- maybe  
9 those services on behalf of Mr. Kennedy or by  
10 Mr. Kennedy, the cost of those services, I'm  
11 sure, would be very helpful in assessing that,  
12 yes.

13 Q. And you'd agree with me that your client,  
14 Imran Alrai, would know what Pakistan-based  
15 expenses and direct costs were related to  
16 services that DigitalNet provided to  
17 United Way?

18 A. Yeah, I would assume that.

19 Q. And you would also expect that his company  
20 would have those records; am I right?

21 A. Yeah, under normal circumstances, I think  
22 companies do keep records and that would be  
23 reasonable.

24 Q. And you were not provided with any of those  
25 records or corroborating information for

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1 DigitalNet's expenses, or expenditures, or  
2 spending in Pakistan; right?

3 A. I do not have records of that.

4 Q. And are you aware that Imran Alrai had other  
5 business interests, including, like, a gaming  
6 or computer animation company in Pakistan?

7 A. I was not -- I was made aware of that, I  
8 believe, just pretrial, or made perhaps even at  
9 trial when some of that was discussed.

10 MS. LE: Tracy, can you also go to page  
11 eight of this same exhibit, paragraph 42? And  
12 I'm looking at section E -- 42-E.

13 THE WITNESS: Correct.

14 Q. (By Ms. Le) Do you see that, sir?

15 A. I do see that, yes.

16 Q. And feel free to read it out loud, so I don't  
17 misread it again.

18 A. Yeah.

19 "That both Mr. Alrai and DN were adding  
20 what appears to be a significant positive value  
21 to the United Way of Massachusetts Bay through  
22 Mr. Alrai's oversight of DN, DigitalNet, and  
23 DigitalNet's performance of the contracts  
24 awarded to DN."

25 Q. So it's your belief that he provided value; is

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1           that right?

2       A.    Yeah.  So in the case -- some of these are --  
3           we can objectively see value; right?  If  
4           they're contracted to provide a phone service  
5           and a phone service exists, then there's, of  
6           course, value there.  Much of the website, you  
7           can go to the website and see that there is  
8           value.

9                   And so we also got to see testimony or  
10           statements by fellows -- or leadership at the  
11           United Way, as well as his performance reviews.  
12           And so we can see through those that,  
13           generally, his peers felt that he was doing a  
14           good job.  He received positive reviews.

15                   And that's why I say "what appears to be  
16           significant positive value."  There's certainly  
17           IT projects being delivered, and they seem to  
18           be happy with them as a result of a review of  
19           that type of material.

20       Q.    Okay.

21                   But you do understand that when DigitalNet  
22           was hired to provide IT services for  
23           United Way, they didn't know Mr. Alrai's  
24           connection to DigitalNet; you know that, right?

25       A.    It's my understanding that that is true.

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1 Q. Now, let's talk about Mr. Naviloff's loss  
2 calculations.

3 A. Sure.

4 Q. Because basically, here you kind of disagree  
5 generally with how he approached loss  
6 calculations; is that right?

7 A. I disagree that -- my understanding is that  
8 when you talk about potential loss calculation,  
9 part of that is a value of services or what  
10 services -- where we're talking about those  
11 three categories of duplicative billing,  
12 services not rendered, or excess markup, I  
13 believe that there are elements of his analysis  
14 which are not properly technically informed.  
15 And so there are mistakes there, yes.

16 MS. LE: So, Tracy, what I'd like to do is  
17 pull up Mr. Sgro's most recent report that was  
18 attached as Exhibit F.

19 MS. UHRIN: I apologize, Attorney Le.  
20 Which exhibit?

21 MS. LE: F as in "fish."

22 THE WITNESS: I actually think it might be  
23 Kk for this hearing.

24 MS. LE: Oh, is it Kk? Thank you.

25 KK. If we can start on page 12, that



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1 would be great.

2 (Pre-marked Defendant's Exhibit Kk  
3 introduced.)

4 Q. (By Ms. Le) So, Mr. Sgro, let's start off with  
5 this before we go into detail.

6 But you understand that Mr. Naviloff's  
7 loss calculation -- the first theory, right,  
8 totaled \$3.5 million; is that right?

9 A. Something thereabouts, yes.

10 Q. And he limited that analysis to infrastructure  
11 hosting, virtual desktops, data management, and  
12 high-availability backup storage and monthly  
13 recurring phone services; is that right?

14 A. That seems right, yes.

15 Q. And Mr. Naviloff specifically did not include  
16 the \$3.245 million that he assumed value for  
17 for "digital web development"; is that right?

18 A. Yeah, I believe that that is true.

19 Q. The "hosting fee"; is that right?

20 A. I believe so.

21 Q. "On-site and after-hours remote IT support"; is  
22 that right?

23 A. Yeah, that would be the help -- what we would  
24 consider help desk.

25 Q. And then the bucket that he called "special

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1 assessments and miscellaneous expenses."

2 A. Yes, I recall that.

3 Q. And there's another bucket that he calls  
4 "hardware and software implementation and  
5 application, database and OS management"; is  
6 that right?

7 A. That is correct.

8 Q. So I'm going to focus my discussion with you  
9 only on the stuff you did consider; okay?

10 A. Okay.

11 Q. And I'm going to actually follow the model of  
12 your report, the areas that you raise issue  
13 with his analysis based on your review of  
14 posttrial discovery; okay?

15 A. Okay.

16 Q. So we'll start here on page 12 and 13, which  
17 relates to your analysis of the SIP invoices;  
18 is that right?

19 A. Yes, 12 is regarding SIP.US and the finding of  
20 excessive billing.

21 Q. So in this instance, DigitalNet charged  
22 United Way, at least Mr. Naviloff testified,  
23 \$562,580 for managed telephony services; is  
24 that right?

25 A. That's correct.

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1 Q. DigitalNet was billed \$24,642 by SIP for  
2 telephony services; was that right?

3 A. Yes, that's correct.

4 Q. And your position is that Mr. Naviloff, quote,  
5 "incorrectly assessed this as an example of  
6 excessive billing on the part of DigitalNet";  
7 is that right?

8 A. Yes, that's correct.

9 Q. And this is where you brought in your  
10 hypothetical about the car and the tires;  
11 right?

12 A. Right.

13 So just to be clear, the \$24,000 that was  
14 billed to DTS for telephony services -- so SIP  
15 is a small piece of delivering a phone system.  
16 It is not the totality of the componentry that  
17 would be required to have voicemail, make a  
18 dial tone, that sort of thing. So that's why I  
19 believe that it's not an apples-to-apples  
20 comparison that \$24,000 is not marked up to  
21 \$562,000, roughly.

22 Q. Right.

23 But you do know that -- and Mr. Naviloff  
24 specifically cited this in his report -- that  
25 his evaluation did not include the initial

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1        setup and equipment purchase, which DigitalNet  
2        billed separately at over \$200,000; isn't that  
3        right?

4        A.    I agree, yes.    That's correct.

5        Q.    And he also didn't include "application OS from  
6        database management," which was billed  
7        separately at \$3,500 a month; is that right?

8        A.    Yeah.    So "application OS and database  
9        management" don't have anything to do with the  
10       context of which I'm speaking here.

11       Q.    But isn't this a voice over IP phone service?

12       A.    It is indeed.

13       Q.    So tell me, what additional services did  
14       DigitalNet provide on top of those things that  
15       we just talked about that -- those additional  
16       services that support the \$540,000 gulf between  
17       what they paid for SIP for the phone service  
18       and what additional value they've provided to  
19       United Way?

20       A.    All right.

21                So I think the first thing that we brought  
22       up -- and I spoke to this before -- was the  
23       timeline -- the contract of dates to which the  
24       managed -- what you're calling the application  
25       management bucket piece contract was signed.

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1 It actually predates the SIP service by a  
2 considerable margin. So we know that that does  
3 -- if memory serves, we know that that is an  
4 issue with how that relates to the service  
5 directly.

6 With regard to what else is required  
7 beyond the SIP services, right, you have most  
8 of the features of the phone. I agree that the  
9 initial setup might have been covered.  
10 Typically, the initial setup is paid for by a  
11 company as a project, which I think  
12 Mr. Naviloff identifies and moves out of the  
13 scope of this discussion. I would agree with  
14 you.

15 But there is ongoing network and network  
16 licensing. There's ongoing data, data charges.  
17 There's all the individual features of the  
18 phone systems themselves; right? So things  
19 like voicemail, or cellphone twinning, which  
20 is, like, when it goes to your cellphone.  
21 There's all of these features and whatnot.

22 There's also engineering specific to all  
23 you can -- creating and setting up new phones,  
24 doing that deployment. A phone system is not  
25 just a one-and-done; right? You don't just set

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1       it up and kind of forget about it. There's  
2       setting up the -- what do you call? You're --  
3       all of the operator -- automated attendance.  
4       There's a lot of moving pieces here that  
5       require engineering expertise, that is not  
6       necessarily a help desk item, that go into  
7       providing these services.

8               And I think when you compare this to the  
9       services that Mr. Meyer talks about  
10      providing -- because Mr. Meyer replaced his  
11      phone system with one -- kind of a -- that they  
12      chose, to move away from -- move towards. The  
13      cost of that new phone system is actually not  
14      that different than the cost of the phone  
15      system as it was being managed by DTS; right?  
16      So there's a very similar cost model there.

17   Q.    You listed a bunch of features.

18               Do you know for a fact which of those  
19      features were provided by DigitalNet to  
20      United Way in regards to the managed telephony  
21      services?

22   A.    So I don't know that. And that's part of the  
23      issue of why assessing a number and a value of  
24      this service is so difficult.

25               And I want to point out it's not -- I'm

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1 not trying to take a purist road on this and  
2 saying "you have to look at everything and have  
3 every scrap of data or you can't figure  
4 anything out."

5 A lot of these services -- a lot of those  
6 types of services are not detailed in the  
7 invoices, right, and in the actual invoice and  
8 contracts. And so it would have been great to  
9 be able to see this actual system in order to  
10 help us understand what the real value of the  
11 system was.

12 Because there was a system -- presumably,  
13 there is a phone system -- during Mr. Alrai's  
14 time and tenure at the United Way, there was a  
15 phone system, and it was functioning; right?  
16 So that does have a value. And that value is  
17 considerably higher than \$24,000, which is the  
18 cost of the SIP services; right? And so that's  
19 not a direct correlation of markup.

20 Q. Sir, I think you might not be answering my  
21 question.

22 A. I apologize.

23 Q. But let me just be clear.

24 You don't know what additional features  
25 were offered by DigitalNet to United Way; is

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1           that right?

2       A.    I do not know the totality of the features.

3           That is correct.

4       Q.    And your client, Mr. Imran Alrai, at the  
5           relevant time was a CIO for United Way; right?

6       A.    I believe he was the director of IT or vice  
7           president of IT-something during time, yes.

8       Q.    From September 2014 through September 2017, he  
9           was in one of those IT high-level roles at  
10          United Way; right?

11      A.    That is correct.

12      Q.    And for those relevant times, he was also the  
13           principal of DigitalNet, which was providing  
14           the managed telephony services; is that right?

15      A.    Yes.

16      Q.    So would you agree with me that your client,  
17           Imran Alrai, would know what those extra  
18           services were that were provided by DigitalNet  
19           to United Way for managed telephony services?

20      A.    I would agree that it's possible that he knows,  
21           yes.

22      Q.    And his company would have records of what  
23           those additional features were that were  
24           provided to United Way; right?

25      A.    I can't speak to the records that his company



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1           created or had; but, I mean, there's that  
2           chance, yes.

3       Q.   Like you mentioned earlier, there's a lot of  
4           different ways to get the same information;  
5           right?

6       A.   Sure. There are definitely similar ways to get  
7           similar information, yes.

8       Q.   One of the ways you suggested was having access  
9           to this, quote, "IT environment"; right?

10      A.   With regard to the telephony system, yes. Or a  
11          backup of it -- any copy or ability to see this  
12          environment, that's correct.

13      Q.   And if one were the vendor providing said  
14          services, one would expect the vendor to have  
15          the records to support what services they've  
16          provided; that's fair, right?

17      A.   I would think that that was possible, yes.

18      Q.   Would you agree with me --

19               THE COURT: Well, let me ask a question  
20               now.

21               I understand your line of questioning, and  
22               it would make sense to me in a case of normal  
23               discovery, like a discovery violation of a rule  
24               or a court order.

25               But would you agree with me that even if

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1 the Defendant has the records you're talking  
2 about, if they're exculpatory records and they  
3 are in the possession of or under the control  
4 of the Government, the Government still has an  
5 obligation to produce them?

6 MS. LE: Right. But that is not my  
7 argument, Your Honor. The point is that there  
8 can be no prejudice here if there was a  
9 different way for Mr. Sgro to conduct his  
10 analysis, as he has recognized, separate and  
11 apart from records that we did not possess and  
12 could not produce.

13 So this goes, again, to our discussion  
14 about how can there be prejudice to the  
15 Defendant with respect to Mr. Sgro's testimony  
16 at trial, and his ability to assist counsel on  
17 cross-examination of Mr. Naviloff, Mr. Meyer,  
18 and any other quote, "technical witness," that  
19 the Government presented, Your Honor?

20 THE COURT: Well, which horse are you  
21 riding on? Is it didn't possess and can't  
22 produce? Or no prejudice, even if you could  
23 produce it and you did possess? I'm trying to  
24 keep up.

25 MS. LE: Number one, the records that have

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1       been produced since trial consisting of  
2       email -- internal email communications of RSM  
3       that were not in our possession -- Your Honor,  
4       we cannot produce that, so we don't have an  
5       obligation to produce that.

6               THE COURT: You don't think --  
7       Mr. Naviloff said he met with the prosecutors  
8       and with Commisso and discussed those emails.

9               MS. LE: But --

10              THE COURT: Wait a minute. Hold on.

11              MS. LE: Sure.

12              THE COURT: Now, you might not have had  
13       possession of them, but you certainly knew  
14       about them. And you don't think a prosecutor  
15       has an obligation to review internal expert  
16       file information to determine if there's  
17       anything exculpatory? That's a problem here  
18       that none of this is going to address.

19              And I need to understand from you --  
20       you're telling me, then -- and believe me, the  
21       obligations of a prosecutor here is not  
22       something there's a lot of precedent for. I  
23       recognize that. But I think it's incumbent on  
24       a prosecutor who knows about records in an  
25       expert file to review them, and at least to

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1 make a determination if they are exculpatory.

2 They weren't ordered to be produced, I  
3 agree. And they weren't -- there's no court  
4 rule that required production, we agreed. But  
5 once you know about them and they're in the  
6 expert's file, there's at least an argument  
7 that there's an obligation to review them for  
8 exculpatory information. All right.

9 MS. LE: Your Honor, I think this is --  
10 the other difficulty here is that they --  
11 "they" being the defense counsel -- have  
12 alleged generally that everything that we  
13 haven't handed over -- every single one of  
14 those emails is exculpatory, for some kind of  
15 indirect way that they could be used to either  
16 impeach Mr. Naviloff about his colleagues on  
17 whom he may have had conversations, or  
18 information that Mr. Sgro could or could not  
19 have reviewed, Your Honor.

20 THE COURT: Sure, but where you're going  
21 to have a problem, AUSA Le, is that I don't  
22 share that opinion that every single email is  
23 exculpatory. But I do share the opinion that  
24 some of them were; all right? And I concur  
25 that you may or may not have had possession of

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1       them. I don't really know. But I do know, at  
2       least, it was discussed. And some of them were  
3       exculpatory. Witness credibility is  
4       exculpatory. That's the law. And some of this  
5       stuff goes to Mr. Naviloff's credibility.

6               And what I'm asking you is, very  
7       specifically -- I think you answered me, by the  
8       way, because you talked to me about prejudice.  
9       It sounds like you're telling me that -- let's  
10      assume for a moment that it was exculpatory. I  
11      know you're not agreeing to that. But assuming  
12      it is exculpatory, and if it was also available  
13      somehow to Mr. Alrai, are you saying that that  
14      relieved the prosecution of its obligation to  
15      produce it?

16             MS. LE: This goes back to the question of  
17      prejudice.

18             THE COURT: So there can't be prejudice if  
19      the information was also readily available to  
20      Mr. Alrai, is the idea?

21             MS. LE: Right.

22             And this is another example that I will  
23      speak with on Mr. Sgro later, because there is  
24      an email that they reference about  
25      CloudConnect. And in the email, there are

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1 Bates-labeled records that are referenced. And  
2 they're discussing amongst themselves what --  
3 those Bates-labeled records that came from  
4 grand jury subpoenas that were provided by the  
5 Government in pretrial discovery to the  
6 Defendant. So we give them the underlying  
7 record.

8 Mr. Sgro could have come up with whatever  
9 conclusions he had, which may or may not be on  
10 the same page that RSM had. But the basis is  
11 it's the underlying records which are  
12 exculpatory, potentially -- and that was  
13 produced in discovery pretrial. Mr. Sgro had  
14 access to it. We produced that to Defense  
15 counsel. Those were records that were not  
16 possessed by the United Way, Your Honor.

17 THE COURT: Wait a minute.

18 Not possessed by United Way?

19 MS. LE: Right.

20 We got it through grand jury subpoena from  
21 the vendors. The CloudConnect records that  
22 were referenced in Defense Exhibit -- let's  
23 see -- in M, for example, Your Honor, which  
24 Mr. Eaton went through with Mr. Sgro. And  
25 they're talking about -- communications between

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1 RSM's employees about records that were  
2 produced by grand jury subpoena.

3 THE COURT: Yeah. Okay. I get it.

4 MS. LE: So, I mean, Your Honor, there is  
5 more than one source for the information that  
6 is allegedly potentially exculpatory. What the  
7 problem is, and I think this is the Court's  
8 struggle, and you kind of clued us into this,  
9 which was -- what is the authority that says  
10 that the Government has an obligation to  
11 obtain, from its third-party expert witness,  
12 delivered or processed email?

13 THE COURT: Yeah.

14 MS. LE: Now, do we, as a general idea,  
15 know that people email one another? I'm sure  
16 that Mr. Sgro has emailed --

17 THE COURT: Wait a minute.

18 But that's not the evidence now. The  
19 evidence is not -- is it a general idea.  
20 Mr. Naviloff testified he told you about the  
21 emails.

22 MS. LE: With respect, Your Honor, I think  
23 Mr. Naviloff said that he recalls some  
24 conversation about whether there should be  
25 emails that should be disclosed. And the

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1 general understanding was that they would not  
2 have to be disclosed, Your Honor.

3 And my belief is that unless there is  
4 something that bears to contradict what a  
5 witness says, if a witness includes that  
6 information -- the communication -- the  
7 substance of the communication in their formal  
8 reporting, that that is covered. You don't  
9 need all the same information repeated multiple  
10 times.

11 THE COURT: Again, first of all, just so  
12 you know, my understanding of Naviloff's  
13 testimony is that he talked to you and  
14 Mr. Commisso about these emails. All right.

15 MS. LE: No, Your Honor. I believe he  
16 said Mr. Davis or Mr. Hunter. I was not  
17 involved any of those communications.

18 THE COURT: I'm sorry. I didn't mean you.  
19 I didn't mean you, personally. I meant the  
20 office.

21 Now, that's my understanding of the  
22 evidence. But, again, it's -- the decision --  
23 I even said it at the time to Naviloff. The  
24 decision not to produce the emails -- that  
25 wasn't unreasonable. It doesn't seem to have



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1       been required by the rules of discovery. I  
2       think I agree with you. But once the office  
3       knows about the emails that the file contains  
4       -- you're putting an expert on the witness  
5       stand. I mean, I just think it's at least good  
6       practice.

7               And I don't know what the authority is --  
8       I know that there's probably no authority  
9       requiring the production of those in normal  
10      criminal discovery; but I do wonder if there's  
11      not a duty, in coming upon a prosecutor, to  
12      review that to ensure that there's nothing  
13      exculpatory. And my view about some of these  
14      emails -- none of this is devastating stuff, I  
15      agree with you. But some of it has exculpatory  
16      value.

17             As to Mr. Sgro, I kind of interrupted you  
18      there, and I apologize. I -- to me, at least  
19      from what I've heard so far, the value of any  
20      of this has much more to do with examining  
21      Naviloff on cross, or perhaps maybe even Meyer,  
22      than it does arming Mr. Sgro with  
23      more information. I just think that for many  
24      of the reasons you're pointing out here on  
25      cross, that might not have made too much of a

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1 difference.

2 So for what that's worth -- anyway, I  
3 interrupted you, and I'm sorry. You answered  
4 my questions, and I'll let you continue.

5 MS. LE: Your Honor, I think that we're  
6 going to have the transcripts of Mr. Naviloff's  
7 testimony prepared at some point, so I'm just  
8 speaking from my recollection and understanding  
9 and appreciation of his testimony.

10 But it wasn't clear to me, and I think you  
11 had a little bit of an exchange with him, about  
12 when this conversation might have occurred  
13 between Mr. Naviloff, Mr. Commisso, and some  
14 member of the U.S. Attorney's Office -- whether  
15 that was pretrial, I'm not clear on, but  
16 certainly since trial -- do you see where the  
17 confusion comes in about where our obligation  
18 would have been?

19 THE COURT: Sure. Yes, I do see what  
20 you're saying.

21 I took that testimony -- remember, I kept  
22 telling Naviloff, "We're talking about  
23 pretrial, not post."

24 Because he kept going into his whole  
25 routine about, "Oh, well, it's 600 emails, and

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1 we were so forthcoming." And it's true, but we  
2 were focused on pretrial.

3 Now, if I misunderstood that, yeah, I'll  
4 need to be disabused of that. But, look, I  
5 think that's an easy thing to solve. We're  
6 going to hear from Mr. Commisso. And I would  
7 never put any of the AUSAs to the indignity of  
8 going under oath, but I assume you'll represent  
9 to me what happened there. You'll explain it  
10 to me -- somebody will -- just during the  
11 context of this hearing at some point, so I'm  
12 sure I'll get that clarified. But, yeah, to  
13 the extent that I misunderstood the timing,  
14 that's important. Okay.

15 MS. LE: And, Your Honor, I might have  
16 misunderstood that timing too.

17 THE COURT: It could have been either of  
18 us.

19 MS. LE: Right. Okay.

20 Q. (By Ms. Le) So let's move on and talk about  
21 your discussion of CloudConnect, which is the  
22 next section of your reporting; right -- the  
23 supplemental report?

24 A. Can we pull that up?

25 MS. LE: I think if you move to

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1 page 15-16, Tracy.

2 Q. (By Ms. Le) Mr. Sgro, can you review page 15  
3 and make sure this is the section you were  
4 talking about, "CloudConnect"?

5 A. I begin speaking about CloudConnect in section  
6 D, I believe.

7 Q. Right.

8 There in document 130 -- that part?

9 A. Yeah, that looks to be true. I apologize. It  
10 is very small.

11 Q. Sure.

12 Tracy, can you highlight D through E?

13 A. Yeah.

14 Q. So this is your kind of analysis for why, based  
15 on your review of posttrial discovery, you have  
16 issues with his analysis; is that right?

17 A. Yeah, this outlines some of the issues that I  
18 have with the analysis. That is correct.

19 Q. Part of it is that this isn't really an  
20 apples-to-apples comparison; is that right,  
21 sir?

22 A. That is correct.

23 MS. LE: I think -- can we go to page 16,  
24 Tracy? And we'll go to the first two  
25 paragraphs on top.

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1 Q. (By Ms. Le) Can you explain what it is that  
2 you agreed with Mr. Naviloff, and what  
3 additional services were delivered as far as  
4 you know?

5 A. Yeah.

6 So the first sentence is that  
7 "CloudConnect is simply a sandbox in which  
8 value-added resellers" -- so that would be  
9 pretty much anyone like DigitalNet or any other  
10 company that actually builds any engineering in  
11 the Cloud. We build for the client.  
12 CloudConnect is not a service unto itself  
13 outside of hosting; right? So they provide a  
14 sandbox. A value-added reseller builds within  
15 that sandbox.

16 I do agree with Mr. Naviloff on the point  
17 -- well, let me just read this for a second.  
18 Yeah, so the CloudConnect service; right -- the  
19 actual infrastructure that's being provided  
20 there is being used here in this example by  
21 DigitalNet to perform -- to give them --  
22 provide United Way with these services; right?

23 And those services, being what they are, I  
24 believe -- and this is maybe out of context --  
25 is the virtual hosting -- that would greatly

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1 exceed the cost of just having a CloudConnect  
2 service; right? Because that's -- the value  
3 of what's provided to the United Way would, of  
4 course, logically outstrip the cost of just the  
5 sandbox itself.

6 Q. And you reviewed Mr. Naviloff's expert report  
7 where he kind of did a comparison using  
8 DigitalNet's contract with United Way for these  
9 services, and then pulled up CloudConnect's  
10 platform specifications and put them together  
11 in the chart; do you remember that?

12 A. I do remember something to that effect, yes.

13 Q. And in his mind -- at least in his analysis, he  
14 saw that it was near identical language that  
15 seemed to be cut and paste from CloudConnect's  
16 platform specifications into DigitalNet's  
17 contract with United Way; do you remember that?

18 A. Yeah, I do, and I think I can go a step further  
19 and try to explain that for you.

20 When a company like CloudConnect sells  
21 their services through a value-added reseller,  
22 the services that are provided by CloudConnect  
23 are inherent to any services provided by the  
24 reseller. So, for instance, if CloudConnect  
25 provides 99.99 percent uptime, as an example,

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1 then the things that are built within it could  
2 likely have that, and so they would translate  
3 that language through to the end customer as  
4 the value-added reseller.

5 We see this in software quite a bit;  
6 right? So, very common for a value-added  
7 reseller to take the capabilities of the --  
8 kind of the principal -- a CloudConnect-like  
9 object and add those direct capabilities. And  
10 I would agree that it's not usually  
11 copy-and-paste verbatim, but there's nothing  
12 wrong with doing that, technically. Because --  
13 well, and any of the services that are used  
14 that are gained through the CloudConnect  
15 service are inherently passed on to the end  
16 client when you build within it.

17 Q. So maybe I should ask it this way.

18 Did you, yourself, conduct an independent  
19 evaluation of the DigitalNet services as it  
20 relates to CloudConnect in that contract? Did  
21 you do a similar kind of analysis?

22 A. So I was never permitted to see the  
23 DigitalNet/CloudConnect services.

24 Q. No, I mean, did you review the contract  
25 language in the contract between DigitalNet and

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1 United Way?

2 A. Yes, I did.

3 Q. For this particular service?

4 A. Yes, I did.

5 Q. So in addition to the CloudConnect translated  
6 services, what other services did United Way  
7 give --

8 A. You would have to pull that up for me.

9 MS. LE: I think that Mr. Naviloff's  
10 report -- I'm going to have to ask one of my  
11 colleagues to email that to -- Mr. Hunter, can  
12 you help me with that?

13 THE COURT: You know what? It's 4:48.  
14 Let's pick it up next time.

15 All right. I guess, you know what? I'm  
16 going to have counsel confer and schedule the  
17 next time with Charli. We're going to continue  
18 the hearing. We've got to get through the  
19 evidence, and I want to hear your arguments,  
20 and I have questions that I'll pose to you  
21 then. All right. Sorry for the inconvenience  
22 to anybody who's going to be coming back, but  
23 we'll keep on keeping on here.

24 Anybody have anything they need addressed  
25 before we adjourn? Okay. So get in touch --



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1 confirm with each other and get in touch with  
2 Charli.

3 Charli, if you could look and maybe send  
4 them an email with some days or half days open  
5 in the near future. I know it's not easy.

6 THE CLERK: Will do, Judge.

7 THE COURT: Why don't we all commit to the  
8 Friday after Thanksgiving? Just kidding.

9 THE CLERK: So I will be in touch.

10 Do you think we need a good half a day?

11 MS. LE: At this rate, I think we're going  
12 to need another full day.

13 Don't you think, Donna?

14 MS. BROWN: To be on the safe side, I  
15 think, yes. I do not think that Meyer and  
16 Mr. Commisso will be as long as these two  
17 witnesses, but I think to be on the safe --  
18 and, plus, we've got a lot of argument. And,  
19 as the Judge said, he had a lot of questions.  
20 So to probably be on the safe side, I think  
21 that's a good idea.

22 THE CLERK: Okay. I will send you all an  
23 email and we'll select something.

24 Thank you.

25 (The hearing was adjourned at 4:59 p.m.)

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## C E R T I F I C A T E

I, Molly K. Belshaw, a Licensed Shorthand Reporter for the State of New Hampshire, and Registered Professional Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceeding taken at the place and on the date hereinbefore set forth to the best of my skill and ability under the conditions present at the time. Read and sign was not requested.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken, and further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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